* Together with:

King's Garden v. Fed. Comm. Comm. No. 369

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ASSOCIATION ON BROADCASTING STANDARDS, INC.,
MAY BROADCASTING COMPANY, AND
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MICHAEL H. BADER
WILLIAM J. POTTS, JR.
1735 DeSales St., N. W.
Washington, D. C.

Attorneys for Petitioner Association on Broadcasting Standards, Inc.

JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
JOHN L. TIERNEY
1705 DeSales St., N. W.
Washington, D. C.

Attorneys for Petitioners May Broadcasting Company and American Broadcasting Companies, Inc.

Of Counsel:

HALEY, BADER & POTTS
1735 DeSales St., N. W.
Washington, D. C.

MCKENNA & WILKINSON
1705 DeSales St., N. W.
Washington, D. C.

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IN THE

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No.

ASSOCIATION ON BROADCASTING STANDARDS, INC.,
MAY BROADCASTING COMPANY, AND
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petitioners, Association on Broadcasting Standards, Inc., May Broadcasting Company, and American Broadcasting Companies, Inc., ask that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in this case on May 10, 1968 (A. 118a).

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is reprinted in the separate Appendices filed herewith (A. 119). The Report and Order of the Federal Communications Commission (FCC) of July 13,

1967, there affirmed, is reported at 8 FCC 2d 698 (A. 1). The Commission's Memorandum Opinion and Order of October 13, 1967, denying rehearing is reported at 10 FCC 2d 283 (A. 61).

JURISDICTION

The judgments of the Court of Appeals here sought to be reviewed were entered on May 10, 1968 (A. 118). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTIONS PRESENTED

On June 10, 1940, the Federal Communications Commission issued a public statement of policy, formalized into a rule in 1941 (later Section 73.87) which permitted, with some conditions, certain daytime only standard broadcast stations and certain fulltime stations to operate during presunrise hours from 4:00 a.m. with their full daytime facilities. The stated purpose of the rule was to provide rural dwellers, traditional early risers, with needed broadcast service during presunrise hours.

Twenty-six years later, the FCC by rulemaking in 1967 amended its rules so as generally to curtail these previously authorized presunrise operations. Several fulltime and daytime only stations attacked the validity of the new rules in the Court below on varying substantive and procedural grounds. After finding that petitioners below raised "... many substantial questions, both substantive and procedural ...," (A. 123) the Court of Appeals denied the petitions for review and affirmed the Commission's new rules. The questions presented by this petition are as follows:

1. Whether the decision below affirming the Commission's new presunrise rules is in conflict with the decision of this Court in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

2. Whether the Commission's action adopting new presunrise rules has resulted in an illegal modification of outstanding broadcast licenses in violation of Sections 303(f) and 316 of the Federal Communications Act of 1934, as amended (47 U.S.C. Secs. 303(f) and 316).

3. Whether the Federal Communications Commission in its adoption of new presunrise rules acted arbitrarily and capriciously and otherwise not in accordance with law.

STATUTES AND REGULATIONS INVOLVED

1. The Communications Act of 1934, as amended, Sections 303(f), 307(b), and 316 provide as follows:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;
>
> Sec. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

STATEMENT

A. *The Facts*—Petitioner, American Broadcasting Companies, Inc., itself or through its subsidiaries, and petitioner May Broadcasting Company, are licensees of Class III fulltime standard broadcast stations. (47 C.F.R. § 73.21(b)(1)). Petitioner, Asspciation on Broadcasting Standards, Inc., is a trade association, consisting in large measure of simliar licensees of fulltime standard broadcast stations.

In 1941, the FCC promulgated former Section 3.87 (later 73.87) of its Rules and Regulations which, in part, permitted Class III Regional Stations, whether fulltime or daytime only, to operate between 4:00 a.m. and local sunrise with their daytime antenna and power, provided "no undue interference" was caused to other stations by such operations. The rule formalized a policy of the

Commission which had been in existence since 1940, adopted in order to provide needed early morning service to farmers and other persons residing in rural areas. Over the years, many daytime only and fulltime stations provided presunrise service under this rule. Fulltimers used the rule because their nighttime pattern and power is generally inferior to that authorized for daytime operations.

The FCC on December 8, 1961 issued a Notice of Proposed Rule Making (FCC 61-1446) in Docket No. 14419 which looked toward amending Rule 3.87 so as to restrict the presunrise operations of many standard broadcast stations. A Further Notice of Proposed Rule Making was released by the Commission in this proceeding on November 30, 1962 which proposed to limit presunrise operations generally to stations in communities without a local fulltime station. Pending consideration of the new rules, presunrise operations by new stations were generally interdicted.

On July 13, 1967, the Commission issued its Report and Order (A. 1) in which it adopted new rules generally restricting the presunrise operations which petitioners' stations and others had engaged in for many years. Under the new presunrise rules power was limited to 500 watts or less fed into the daytime antenna system, beginning at 6:00 a.m., local standard time. Petitioners therefore could either begin presunrise operations at 6:00 a.m. using their daytime antenna, limited to a maximum of 500 watts, or they could use their authorized nighttime pattern and power until local sunrise. Either way, the presunrise service previously furnished by petitioners' stations was severely cut back.[1]

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[1] While the Commission's original aim in relaxing radiation restrictions in the presunrise period was to improve service to rural areas, in more recent years numerous stations had come to rely on the presunrise rule as a means of remedying deficiencies in service to their principal communities arising from directional antenna limitations, increasing noise levels, interference from other stations and similar causes (R 1206-1227).

Moreover, under the old rule, a fulltime station could preclude presunrise operation by any other station on the same frequency, if it could show undue interference to its licensed nighttime service area. Under the new rules that right is no longer recognized.

B. *The Decisions Below.*—Petitions for review under Section 402(a) of the Communications Act of 1934, 66 Stat. 718, as amended, 47 U.S.C. § 402(a), and under Section 4(e) of the Administrative Orders Review Act, 80 Stat. 622, 28 U.S.C. § 2342, were filed in the United States Courts of Appeals for the Second, Ninth and the District of Columbia Circuits. The several petitions were eventually consolidated for briefing and argument before the Second Circuit pursuant to 28 U.S.C. § 2112(a), 72 Stat. 941.

It was argued before the Court below, *inter alia*, that the new rules would result in a modification of petitioners' outstanding licenses without being first afforded an evidentiary hearing as provided for by Sections 303(f) and 316 of the Communications Act of 1934, as amended. In this regard petitioners relied upon *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

Petitioners also alleged as error that the Commission failed to state a factual basis for the rules adopted, resulting in an arbitrary and capricious action, an abuse of discretion in violation of 5 U.S.C. § 706, 80 Stat. 393, and of Section 307(b) of the Communications Act of 1934, as amended.

The Commission admitted in its Memorandum Opinion and Order, and in its brief before the Court below that it did not know whether adoption of its new rules would result in a net gain or a net loss of service to the public (R. 3545, 3564, 4073). It stated that it refused to engage in a "numbers game" and that in any event its determinations did not rest on "quantitative" factors (FCC

Br. in Nos. 346 and 347, p. 27). The Commission also concluded that ". . . the service to be gained, while perhaps quantitatively less than that to be lost, was more in the public interest because it would provide service where there was a greater need for it" (*Ibid*).

Petitioners pointed out to the Court below that the Commission's two statements in adopting the new rules failed to contain adequate findings of fact to show what "qualitative" advantage the Commission found in the new service permitted by the new rules over the service lost as a result of their adoption. The court was therefore requested to strike the rules as arbitrary.

The Second Circuit held in substance that, although the adoption of the Commission's new rules had resulted in additional interference to petitioners' licensed nighttime operations, and modified their outstanding licenses, petitioners were not entitled to the hearings provided for by Sections 303(f) and 316 of the Communications Act, since the modifications resulted from general rulemaking proceedings not requiring individual adjudications. It so concluded notwithstanding this Court's decision in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943). The Court below held that *KOA*, *supra*, stands only for the proposition that, where a hearing on an individual application is necessary, a licensee who would be aggrieved by a grant of the application had the right to participate therein (A. 151).

The Court below also held that interference to petitioners' licensed nighttime facilities resulting from the new rules did not entitle petitioners to a hearing under Section 303(f) of the Act, since such interference does not affect changes in the "frequencies, authorized power, or in the times of operation of any station" and therefore § 303(f) by its terms does not apply.

Furthermore, the Court held that Section 303(f) did not apply to the reduction in power and hours of presun-

rise operation formerly engaged in by petitioners' stations, "[since] under the old rule these stations did not even have the right to demand an evidentiary hearing to challenge whether the limitations the Commission set upon their operation were in the public interest . . . ." (A. 154).

Finally, the Court held that the Commission was not required to determine whether the adoption of its new rules would result in a net gain or a net loss of service, was not obliged to consider program service in supporting the adoption of its new rules on the qualitative basis of "need", and that considerations of administrative expediency provided a rational basis for the new rules.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below is in Direct Conflict With an Applicable Decision of this Court and Violates Substantive Statutory Requirements.*—The decision of the second Circuit is in direct conflict with that of this Court in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

There, this Court held that where the Commission amends its rules and accepts for filing an application for a proposed change in facilities of an existing station not possible prior to the rule amendment, a grant of which would result in increased electrical interference to another station, the latter is entitled to participate in an evidentiary hearing before the application can be granted.

The instant case presents an identical question. Here the Commission amended its rules and granted authorizations which have modified petitioners' outstanding licenses by subjecting their operations to increased electrical interference. Such action was taken without affording petitioners a hearing, in contravention of Sections 303(f) and 316 of the Communications Act and the holding of this Court in *KOA*.

The Court below failed to recognize that *KOA*, like the instant case, involved rule making. Accordingly, the Second Circuit's attempt to distinguish the present case from *KOA* on the grounds that *KOA* involved only an adjudicatory proceeding is unsound.

In *KOA*, the rule allocating Class I-A frequencies was changed. Here, the Commission changed its rule governing presunrise operations. In *KOA*, the amended rule would have permitted a new authorization resulting in interference to an existing licensed station. Here, the new rule has permitted hundreds of new authorizations causing co-channel interference to the licensed nighttime operations of hundreds of other stations.

The essential holding of *KOA* was ignored by the Court below, namely, that the FCC's rules as they exist at the time a broadcast license is granted are incorporated into the terms of that license even though not set forth on its face. Therefore, any change in those rules affecting the service rendered by the licensee is a modification of license requiring a prior hearing.

Section 316 of the Communications Act of 1934, 66 Stat. 718 (1952), is the successor to Section 312(b), which was construed in *KOA*. As the legislative history shows,[1] the intent of Congress in adopting the present Section 316 was to make specific in the statute what this Court held in *KOA*. Hence, this Court's decision applies with equal force to modifications of license under Section 316 of the Act.

In addition, new rules were adopted without according petitioners the evidentiary hearing required by Section 303(f) of the Communications Act. By requiring petitioners to forego presunrise operations with their daytime facilities prior to 6:00 a.m., the Commission has changed

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[1] See, House Report No. 1750, 82 Cong., 2nd Session, April 8, 1952, 1952 U.S. Code Cong. and Admin. News, 2234, 2248.

their "times of operation." By increasing the interference to petitioners' licensed nighttime operations, the Commission has changed the effective power of petitioners' stations. Both changes under Section 303(f) require a prior evidentiary hearing. See *Saltzman* v. *Stromberg-Carlson Telephone Manufacturing Co.*, 46 F. 2d 612 (D.C. Cir. 1931); *Courier-Journal Co.* v. *Federal Radio Commission*, 46 F. 2d 614 (D.C. Cir. 1931) (construing predecessor language of the Radio Act of 1927).

The Court below rejected the argument that petitioners' power had been changed as a result of the additional interference caused to their licensed nighttime operations under the new rules. The Court claimed that such interference would change only a station's "effective power," and such a change did not entitle a station to an evidentiary hearing under the terms of Section 303(f).

The Commission made a like argument in *KOA*, claiming that interference to a station did not modify its license when the power and frequency stated in the license are unchanged. This Court in construing the hearing requirements of Section 312 rejected that argument as "too narrow a view." The similar narrow view of the Court below should be rejected here in interpreting Section 303(f) of the Act.

At the time the licenses of petitioners' stations were most recently renewed, former Section 73.87 of the Commission's Rules were still in effect. The rule permitted them to operate with the authorized daytime facilities from 4:00 a.m., unless and until they were notified that such operations were causing "undue interference." The provisions of Section 73.87 of the Rules, under this Court's holding in *KOA*, became incorporated into the terms of petitioners' licenses. Under the old rule these presunrise operations could not be terminated by the Commission without first notifying petitioners that they were causing undue interference, a question of fact on which petitioners

were entitled to a hearing. *Music Broadcasting Company*, v. *FCC*, 217 F. 2d 339 (D.C. Cir. 1954). The Commission, in summarily terminating such operations by amending its rules, has changed petitioners' currently licensed hours of operation, and has violated petitioners' rights to an evidentiary hearing as guaranteed by Section 303(f) of the Communications Act of 1934, as amended.

2. *In Expanding the Rulemaking Powers of the Commission and Other Administrative Agencies and Correspondingly Curtailing Hearing Rights Conferred on Private Parties by Congress and Due Process, the Court Below Has Decided an Important Question of Federal Law Which Should be Resolved by This Court.*—The Court below has held that the Commission can by rulemaking do what it is otherwise prohibited by statute from doing, namely, modify the licenses of broadcast stations during their outstanding terms, without first offering the licensees adversely affected their right to an evidentiary hearing as provided for by Sections 303(f) and 316 of the Communications Act of 1934, as amended. Such a conclusion is in conflict with the opposite holdings of two cases decided by the United States Court of Appeals for the District of Columbia Circuit. *Transcontinent Television Corporation* v. *FCC*, 308 F. 2d 339 (1962); *The Goodwill Stations, Inc.* v. *FCC*, 325 F. 2d 637 (1963). The Second Circuit deemed these cases distinguishable because it believed the scope of the rulemaking proceedings there involved to be less broad than in the present proceeding (A. 151). *Goodwill*, at least, cannot be so distinguished.

In holding that current licenses can be modified without hearing by the rulemaking process, the Court relies primarily on *California Citizens Band Association* v. *United States*, 375 F. 2d 43 (9th Cir. 1967), cert. denied, 389 U.S. 844 (1967); *Airline Pilots Association, International* v. *Quesada*, 276 F. 2d 892 (2nd Cir. 1960), and

American Airlines, Inc. v. *CAB*, 359 F. 2d 624 (D.C. Cir., *en banc*, 1966), cert. denied, 385 U.S. 843, none of which makes even passing reference to *KOA*.

Moreover, the decision below failed to point out that the Court in *California Citizens Band, supra*, agreed with the Commission that "public evidentiary hearings" are required before basic license rights, such as those involved here, can be changed. *Airline Pilots Association, supra*, involved urgent public safety questions not presented here, and the *American Airlines* case *supra*, was prospective in its effect upon service, whereas here the Commission's new rules remove service of many years' standing upon which the public had come to rely.

3. *The Decision Below is Bottomed on Inadequate Agency Findings and Contravenes Section 307(b) of the Communications Act.*—The principle is well established that the conclusions of an administrative agency are subject to judicial review, and "for that purpose the reviewing authorities must know the bases upon which the conclusions rest." *American Trucking Associations, Inc.* v. *FCC*, 377 F. 2d 121, 134 (D.C. Cir. 1967). Here the Commission supplied no rational bases for the actions it took.

The Commission admitted below that it did not know whether its new rules would result in a net gain or a net loss of service to the public. It stated simply in this regard that it refused to engage in a "numbers game" (R. 3545) and that in any event its determinations did not rest on "quantitative factors." It claimed that its decision to adopt its new restrictive presunrise rules was on the basis of the "material studied and on its own expertise, [that] the service to be gained, while perhaps quantitatively less than that to be lost, was more in the public interest because it would provide service where there was a greater need for it."

The Commission did not indicate what non-quantitative factors, if any, it considered in finding a "greater need" for the new presunrise services, to be established at the expense of deleting or restricting long-established services for which a need had been shown. The Commission made no study of the particular program needs of each area. The Commission's Orders herein are devoid of any findings that the stations serving or proposing to serve those areas during presunrise hours were, in fact, meeting or proposing to meet those program needs.

The Court below accepted the Commission's contention that it was not required to consider program needs. Thus, it becomes clear that the Commission totally failed to articulate valid reasons for the adoption of its new rules which would result in a net loss of broadcast service to people throughout the United States. Without weighing the only quantitative or qualitative considerations available to it, the Commission had no intelligent way to determine whether its new rules would result in a proper distribution of licenses, frequencies, hours of operation, and of power among the several states and communities so as to provide the fair, efficient and equitable distribution of radio service required by Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b). Therefore, the Commission's action in adopting its new rules was not based on proper findings of fact, was arbitrary and capricious, and should have been reversed and remanded by the Court below.

The attempt of the Second Circuit to support the result reached by the Commission on grounds other than those stated by the agency itself contravenes *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision below be reviewed by this Court on Writ of Certiorari.

MICHAEL H. BADER
WILLIAM J. POTTS, JR.

Attorneys for Petitioner Association on Broadcasting Standards, Inc.

JAMES A. MCKENNA, JR.
VERNON L. WILKINSON
JOHN L. TIERNEY

Attorneys for Petitioners May Broadcasting Company and American Broadcasting Companies, Inc.

Of Counsel:

HALEY, BADER & POTTS
1735 DeSales St., N. W.
Washington, D. C.

MCKENNA & WILKINSON
1705 DeSales St., N. W.
Washington, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

THE KING'S GARDEN, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner King's Garden, Inc. asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 10, 1968, denying petitions to review certain Orders of the Federal Communications Commission.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is included at page 119 of the Appendices.[1] The

[1] In addition to King's Garden, Inc. other parties to the proceeding in the Second Circuit (i.e. Association on Broadcasting Standards, Inc., American Broadcasting Companies, Inc., May Broadcasting Company and WBEN, Inc.) are also seeking certiorari and a joint document entitled Appendices to Petition For Writs of Certiorari to the United States Court of Appeals for the second circuit is being filed.

Report and Order of the Federal Communications Commission adopting the revised Rules in issue is reported at 8 F.C.C. 2d 698 (1967) and appears at page one of the Appendices. The Memorandum Opinion and Order of the Federal Communications Commission denying petitions for reconsideration is reported at 10 F.C.C. 2d 283 (1967) and appears at page 61 of the Appendices.

JURISDICTION

The judgment of the Court of Appeals here sought to be reviewed (Appendices, page 118(a)) was entered May 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS FOR REVIEW

Whether a station's existing hours of broadcast and power may be reduced by the Federal Communications Commission without an evidentiary hearing.

Whether in determining to reduce the hours and power of broadcast stations the Federal Communications Commission may disregard the programs which are broadcast by such stations and the needs of the public for such programs.

STATUTES AND REGULATIONS

Sections 303(f) and 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. 303(f) and 316(a) provide:

"Section 303(f): [The Commission shall] Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with."

"Section 316(a): Any station license or construction permit may be modified by the Commission either for

a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue; Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.".

Section 73.87 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 73.87 formerly provided in pertinent part:

"Section 73.87 Program transmissions prior to local sunrise

(a) The provisions of [other sections not here pertinent] shall not prevent the transmission of programs between 4 o'clock a.m. local standard time and local sunrise, of standard broadcast stations with their authorized daytime facilities . . .

(b) Any station operating during such hours receiving notice from the Commission that undue interference is caused shall refrain from such operation during such hours pending further notice from the Commission."

Section 73.99 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 73.99 provides in pertinent part:

"73.99 Presunrise service authority

(a) . . . the following classes of standard broadcast permittees and licensees are eligible to request presunrise service authority (PSA):

(2) Class III stations.

(b) When issued, a PSA will permit:

(2) Class III stations to commence operation with their daytime antenna systems at 6 a.m. local standard time, and to continue such operation until local sunrise: Provided, That the permissible power, to be specified in the PSA, shall not exceed 500 watts or such lesser power as may be determined on the basis of calculations made pursuant to paragraph (c) of this section.

(c)(3) For Class III stations, a showing that cochannel stations in foreign countries will receive full treaty protection. If such protection cannot be achieved on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced to preclude objectionable interference: Provided, That with respect to Canadian Class III stations, such power level may be established by a showing that the radiation at the pertinent vertical angle toward cochannel Canadian stations does not exceed that defined in Figure 12 of § 73.190. If the latter showing cannot be made on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced in order to limit radiation at the pertinent vertical angle to the values specified in Figure 12 of § 73.190."

STATEMENT OF FACTS

Background as to Petitioner and KGDN

Petitioner, the King's Garden, Inc., is the licensee of standard broadcast station KCDN located at Edmonds, Washington, just outside the city of Seattle, Washington.

The King's Garden, Inc. is a non-profit inter-denominational religious organization which serves the Seattle area. It has four religious schools, a senior citizen community, two homes for boys, youth Bible clubs, and a service organization dedicated to the social betterment and moral enrichment of the Seattle area. In accordance with that objective,

the King's Garden operates station KGDN with a non-denominational religious-oriented program format.

Station KGDN, which began broadcasting in 1954, is a Class III, Regional Broadcast Station, which under the Federal Communications Commission's Rules[2] is ". . . a station which operates on a regional channel and is designed to render service primarily to a principle center of population and the rural area contiguous thereto".

KGDN operates on the frequency of 630 kilocycles. When KGDN began operating in 1954, it operated with a power of one thousand (1,000) watts. In 1959, upon application by the King's Garden, the Commission found it to be in the public interest, convenience, and necessity to increase KGDN's operating power to five thousand (5,000) watts, at which power the station has been operating since that time. With its power of five thousand (5,000) watts, KGDN serves a population of some 706,821 persons in a wide area of 531 square miles surrounding Edmonds.

At the time KGDN began broadcasting in 1954, and up until the very recent Commission actions under review herein, KGDN was permitted under the Commission's Rules to begin broadcasting at 5:00 a.m. each morning, with its full authorized power. Such operation was fully authorized by the provisions of Section 73.87, 47 C.F.R. 73.87, of the Commission's Rules which provided in effect that a station could begin operating as early as 4 a.m. with its full authorized power if it did not cause any "undue interference" to any other broadcast station. This operation in the early morning hours before local sunrise is referred to as a pre-sunrise operation. Since KGDN's early morning pre-sunrise operation did not in fact cause any "undue interference" to other broadcast stations, it has continually operated during these pre-sunrise hours with its full authorized power for the past thirteen years. The present license of

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[2]Section 73.21(b)(1), 47 C.F.R. 73.21(b)(1).

KGDN was renewed by the Commission as of February 1, 1966 and expires on February 1, 1969.

The amount of time involved in KGDN's pre-sunrise operation is substantial. Thus, sunrise occurs at Edmonds, Washington, at the following times during the year:

January	8:00 a.m.
February	7:15 a.m.
March	6:30 a.m.
April	5:30 a.m.
May	4:30 a.m.
June	4:15 a.m.
July	4:30 a.m.
August	5:00 a.m.
September	5:45 a.m.
October	6:30 a.m.
November	7:15 a.m.
December	7:45 a.m.

Thus, during eight months of the year KGDN's customary sign-on time of 5:00 a.m. occurs prior to local sunrise, and KGDN's pre-sunrise operation totals some 439 hours per year. KGDN is required to terminate its broadcast day at local sunset,[3] and during certain months, particularly October through March, sunset occurs quite early. Thus, during those months KGDN operates with a shortened broadcast day and its pre-sunrise operation constitutes a substantial portion of its total broadcast day.

By its Orders and related Rules herein, the Commission would effectively eliminate KGDN's pre-sunrise operation. Specifically, if the Commission is upheld KGDN could not commence broadcasting with its full authorized power of 5,000 watts until local sunrise. The Commission's revised

---

[3] Local sunset at Edmonds, Washington occurs at the following times: January, 4:45 p.m.; February, 5:30 p.m.; March, 6:15 p.m.; April, 7:00 p.m.; May, 7:45 p.m.; June, 8:15 p.m.; July, 8:00 p.m.; August, 7:30 p.m.; September, 6:30 p.m.; October, 5:30 p.m.; November, 4:30 p.m.; December, 4:15 p.m.

Rules would permit KGDN to begin pre-sunrise broadcasting at 6:00 a.m., with a power of 58 watts.[4] However, 58 watts of power is far below the minimal required for effective operation, and KGDN has determined that it cannot operate at that power. Hence, the true impact of the revised Rules is to completely terminate KGDN's pre-sunrise operation. The loss of KGDN's pre-sunrise broadcasts will severely injure the public and the King's Garden, Inc., and it is to prevent such public and private injury that judicial relief has been sought.

The public has come to rely upon the unique pre-sunrise programming of KGDN. Since its inception in 1954, Station KGDN has attempted to fulfill the spiritual needs of the listeners of its service area by providing a high quality program format of spiritually uplifting religious programs. This is done especially during the early morning hours because it is the only time of the day many persons have an opportunity to listen to these programs. The availability of KGDN's programming during these particular hours of pre-sunrise is especially important by reason of the substantial number of persons throughout the area whose day, and that of their families, starts early to permit them to travel to work at Boeing and other industrial plants in the Seattle area.

THE COMMISSION'S ACTIONS UNDER REVIEW

In a Report and Order[5] released July 13, 1967, the Commission concluded a Rule-Making proceeding by changing its Rules relating to pre-sunrise operation of standard broadcast stations. The changed Rules, among other things, would effectively abolish KGDN's pre-sunrise operation. Petitions for reconsideration of the changed Rules were denied by the Commission in a Memorandum Opinion and Order, 10 F.C.C. 2d 283, released October 17, 1967.

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[4] As a result of the calculations specified in Section 73.99(c)(3), 47 C.F.R. 73.99(c)(3) of the revised Rules.

[5] 8 F.C.C. 2d 698.

The Rule-Making proceeding which led to the revised Rules provided for written comments only. There were no evidentiary hearings, nor were there any oral presentations or argument before the Commission.

The primary impact of the change in Commission regulations upon KGDN's operation was to specify that KGDN could not begin broadcasting with its full authorized power of five thousand (5,000) watts until local sunrise. The Commission's Rules did provide that KGDN could begin broadcasting at 6:00 a.m. with a power of 58 watts, but that obviously low power would not permit KGDN to even cover the entire city of Edmonds, Washington, much less any wider area, and in fact would eliminate over 90% of its coverage area. In point of fact, the Commission considers 500 watts to be the absolute minimum power for Class III AM radio stations such as KGDN. Operation at 58 watts is so impractical and would be so destructive of the station's good will that KGDN could not operate at that power level. Thus, the true impact of the Commission's Orders is that KGDN would have no early morning pre-sunrise operation.

Faced with the disruption of its long-standing pre-sunrise operation, the King's Garden on October 24, 1967, petitioned the Commission for a waiver of its revised Rules to permit it to continue to operate as it had for the previous thirteen years with full authorized power pre-sunrise, or to at least permit a hearing on the waiver request. The King's Garden also requested the Commission to hold an evidentiary hearing as required, it was contended, by Section 316(a) of the Communications Act of 1934, as amended. In a telegram dated November 1, 1967,[6] the

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[6]The telegram stated:
"November 1, 1967

Radio Station KGDN
Edmonds, Washington

Relet Atty 27. Regret PSA power in excess of that permitted by foreign protection considerations not grantable. Reasons sufficient, if true, to justify waiver have not been alleged. Refer agreement with

Commission denied all of the King's Garden's requests for relief and hearing.

SUBSEQUENT COURT PROCEEDINGS

The King's Garden, pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342 and 2343, petitioned for review of the Commission's actions, first in the United States Court of Appeals for the Ninth Circuit and then, in accord with 28 U.S.C. 2112, in the Court of Appeals for the Second Circuit where WBEN, Inc. had earlier initiated a petition for review, and where other related petitions for review were pending. Subsequently, all the petitions for review of these Commission actions pending in the Second Circuit were consolidated for oral argument and the judgment of which review is sought in this Court.

REASONS FOR GRANTING THE WRIT

By its actions under review, the Federal Communications Commission would effectively terminate a unique broadcast service rendered by station KGDN during the pre-sunrise hours for the past thirteen years. Yet the Commission decreed this reduction in public service without affording KGDN an evidentiary hearing and without considering programming or programming needs. The Commission actions present important questions of federal law which are of wide applicability, of public importance, and which should be settled by this Court.

Canada formalized June 12, 1967, and final agency decisions of June 28 (FCC 67-767) and October 11 (FCC 67-1143). Therefore necessary that you either operate accordance terms of station license or, if pre-sunrise sign-on is continued, that power be reduced to 57 watts per Comtel October 17. Refer Section 73.87 and 73.99 Rules. Request for evidentiary hearing and petition for waiver, both filed October 24, 1967, hereby denied.

George S. Smith, Chief Broadcast Bureau Federal Communications Commission"

First, the question of whether an evidentiary hearing was required. Section 303(f) of the Communications Act of 1934, as amended, 47 U.S.C. Section 303(f), provides in essence that changes in the authorized power and times of operation of any broadcast station shall not be made by the Commission without consent of the station licensee unless it is determined after a public hearing that such changes will promote the public interest, convenience and necessity.[7] Here it was clear and not disputed that the Commission's actions had substantially changed and reduced KGDN's power and times of operation. There thus arises the question as to the applicability of Section 303(f).

Further, Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 316(a) specifically prohibits the Commission from modifying an outstanding station license in any respect until after a public hearing is held to determine whether such a modification would be in the public interest.[8] Closely related is the holding in *FCC*

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[7] "Section 303(f): Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with."

[8] "Section 316(a): Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by

v. National Broadcasting Corporation (KOA), 319 U.S. 239 (1943) wherein this Court held that the Commission's Rules as they exist at the time the station's license is granted are incorporated into the terms of that license, 319 U.S. at 245.

Former Section 73.87 of the Commission's Rules, which permitted KGDN to go on the air as early as 5:00 a.m. with full power and to continue to so broadcast absent a specific complaint of "undue interference" during these pre-sunrise hours, was in effect when KGDN was first licensed in 1954 and when its license was renewed in 1957, 1960, 1963, and most recently, 1966, when KGDN's current license renewal was granted. There has never been a complaint against KGDN as to its pre-sunrise operation. Thus, the Commission's actions under review clearly modified KGDN's license as it incorporated the provisions of former Rule 73.87. Yet the Commission acted without the public hearing guaranteed by Section 316(a). There thus arises the question as to the applicability of Section 316(a).

The Commission and in turn the Court below were of the view that the hearing rights guaranteed to licensees under Section 303(f) and Section 316(a) were not available here. In addition, the holding of this Court in *FCC v. National Broadcasting Corporation (KOA), supra.* was construed by the Court below as requiring no hearing.

It is appropriate to point out that questions posed are substantial. Thus, in finding that neither Section 303(f) nor Section 316(a) was applicable, the Court below construed those provisions quite narrowly. Thus, Section 316(a) was limited in its reach to cases peculiar to an individual licensee and that where Rule-Making is employed, Section 316(a) has no applicability. Contrary to the Court's holding, the language of Section 316(a) is broad and explicit and contains no suggestion whatsoever that it does

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public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice."

not apply where the modification is decreed by Rule-Making. Nor does the Court rest its construction upon the legislative history of Section 316(a). Instead, the Court appears to base its construction on the general theory that Rule-Making is a vital part of the administrative process which should not be inhibited by evidentiary hearing requirements. Section 303(f) was similarly restrictively construed.

These holdings—central to the Second Circuit's decision—present the most fundamental questions as to hearing rights available to parties before administrative agencies and as to the manner in which these agencies perform their statutory obligations. The Second Circuit decision directly affects not only the licensees of the Federal Communications Commission but also all other parties who hold similar authorizations from federal administrative agencies. Hearing rights are the licensee's most important safeguard against arbitrary or capricious or uninformed agency action. Most importantly, an evidentiary hearing permits a licensee to avoid being swept up in a monolithic Rule-Making proceeding where its own case and merits are far too often lost or neglected by reason of the sheer magnitude of the proceeding.

Perhaps the Second Circuit is correct in holding that hearing rights must give way to the administrative expediency of Rule-Making. But the statute does not so state nor does any decision of this Court. If such a fateful determination is to be made, it is respectfully submitted that it should be by this Court.

The second important question of federal law presented concerns whether it was proper for the Commission in rendering its decision to disregard the programming of the stations affected and the needs of the public for such programming. This was particularly critical to KGDN since it is the only standard broadcast station in the entire Seattle area offering religious programming during the pre-sunrise hours, a unique service of particular interest to the many persons whose day and that of their families starts early to accommodate work in the industrial plants in the Seattle

area. Yet KGDN's unique programming and that of other stations was ignored by the Commission. The Court below sanctioned this disregard for programming on the grounds of the alleged administrative burden involved and the subjective nature of programming. This is an area, the Court concluded, where the Commission may decline to consider programming.

The abandonment of programming and programming needs as decisional criteria is most significant. First, it runs counter to the traditional and often stated view as to the importance to the public interest of the programs which are broadcast and the needs therefor, cf. *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (C.A.D.C., 1949); *Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960). Also consider *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1942) where this Court stated at pp. 215-216:

> "Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. *But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.*" (emphasis added)

Here the Commission has acted solely as a "supervisor of traffic" and has consciously eschewed any thought of dealing with the "composition of that traffic". What then of the responsibility referred to above. Perhaps the Second Circuit is correct in upholding the Commission's avoidance of programming considerations and affirming a Commission decision based upon a wholly technical analysis. But the question of whether programming is to be read out of the public interest, warrants, it is respectfully submitted, the consideration of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS I. COHEN
MORTON L. BERFIELD

COHEN AND BERFIELD
711 Fourteenth Street, N.W.
Washington, D.C. 20005

Counsel for
The King's Garden, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WBEN, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN
Attorneys for Petitioner

Of Counsel:

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

THE CASILLAS PRESS, INC. — 1717 K Street, N. W. — Washington, D. C. 20006

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IN THE

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OCTOBER TERM, 1968

No.

WBEN, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, WBEN, Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 10, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is reprinted in the Appendices to Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit filed with the Joint Petition for Writ of Certiorari of Association On Broadcasting

Standards, Inc., May Broadcasting Company, and American Broadcasting Companies, Inc., on August 2, 1968 (Case No. 368).[1] The Report and Order of the Federal Communications Commission (FCC) of July 13, 1967, there affirmed, is reported at 8 FCC 2d 698 (Appendices 1). The Commission's Memorandum Opinion and Order of October 13, 1967, denying rehearing is reported at 10 FCC 2d 283 (Appendices 61).

JURISDICTION

The judgment of the Court of Appeals here sought to be reviewed was entered on May 10, 1968 (Appendices 118-A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTIONS PRESENTED

1. Whether Sections 303(f) and 316 of the Communications Act of 1934, as amended, require the Federal Communications Commission to hold an evidentiary-type hearing before adopting rules which modify an existing broadcast station's license by subjecting such station to electrical interference and reducing its service area?

2. Assuming an affirmative answer to the first question, whether such a hearing also must be held before a station's license is modified effective as of the end of the current term?

STATUTES AND RULES INVOLVED

Sections (303(f), 303(r), 309, and 316 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(f), 303(r), 309 and 316; and Section 73.99 of the Rules and Regulations of the Federal Communications Commission, all of which are set forth in Appendix A to this Petition.

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1 The Appendices are referred to herein as "Appendices."

STATEMENT

This case arises out of a Report and Order of the Federal Communications Commission amending that agency's rules so as to permit certain Class II and Class III standard broadcast stations, with certain restrictions, to commence operation with their daytime facilities at 6 A.M. local standard time. The effect of this permission (Pre-sunrise Service Authority) is to allow the operation of such stations prior to sunrise during a substantial portion of the year with facilities which cause interference to full time Class III stations such as Petitioner's.

Petitioner is the licensee of full-time Class III Station WBEN which is licensed to operate on the frequency 930 kHz with 5 kilowatts power, non-directional daytime with a directional antenna at night at Buffalo, New York. Since 1956, Petitioner has uniformily objected to the pre-sunrise operation of any other Class III station with its daytime facilities when such operation would cause interference to Station WBEN and, as a result of these efforts, the pre-sunrise operation of Station WBEN has been kept free of serious objectionable interference. See, *WBEN, Inc. v. Federal Communications Commission,* 110 U.S. App. D.C. 200, 290 F. 2d 743 (1961).

The new Commission rules, however, foreclose Petitioner, and other full time Class III licensees similarly situated, from protecting their service areas from interference caused by the pre-sunrise operation of other Class III stations with their daytime facilities, since the new rules also contain provisions which prohibit formerly recognized parties in interest, such as Petitioner, from objecting to the issuance of authorizations for pre-sunrise operation of such other Class III stations. In other words, the rule amendments adopted by the Commission's Report and Order prompting this litigation contemplate the "automatic" issuance of pre-sunrise operating authorizations (PSA's) which will create interference to Petitioner's Sta-

tion WBEN (and other stations) without affording Petitioner (or others similarly situated) a hearing of any kind or for that matter even an opportunity to register an objection to the issuance of the authorizations.

If, as may be expected, the 930 kHz stations now eligible for PSA's commence pre-sunrise operation as permitted by the new rules, a land area in excess of 1400 square miles including a population of more than 150,000 persons will lose WBEN pre-sunrise service because of the interference caused by such operation of those stations. This area of interference would lie within the normally protected service area which WBEN is licensed to serve, and the Commission's Report and Order recognizes that the creation of any such interference within this area by the pre-sunrise operation of daytime only stations would constitute an immediate modification of WBEN's license, *i.e.*, for the balance of the term specified in the license as last issued.

Because of the prospective loss of service from the pre-sunrise operation of any daytime only station on 930 kHz, Petitioner submitted comments in the Commission's rule-making proceeding which resulted in the adoption of the new rule amendments, although the Notice[2] which instituted that proceeding contemplated the issuance of pre-sunrise authorizations only in exceptional circumstances, *i.e.*, where the community or urbanized area of the daytime station involved had no unlimited time station available to it. Petitioner's written comments, which were supported by engineering exhibits, detailed the above-described interference potential to WBEN and opposed the adoption of the proposed rules. Other comments in opposition, as well as comments in support of the proposed rules, were filed by various trade associations, consulting engineers, networks and station licensees but no opportu-

[2] This Notice released November 30, 1962, was actually a Further Notice of Proposed Rule Making (FCC 62-1241) although it superseded a prior Notice (FCC 61-1446) released on December 8, 1961.

nity was provided for the presentation of evidence, cross-examination of witnesses, or oral argument. Moreover, the rule-making notice merely requested comments addressed to the rules proposed and did not otherwise specify issues.

On July 13, 1967, the Commission issued the Report and Order which was affirmed by the Court below. The Report and Order amended the Commission's Rules by abolishing the pre-sunrise rules previously in effect and by adding a new Section 73.99,32 Fed. Reg. 10447 (July 15. 1967), which provided in pertinent part, as follows:

73.99 Pre-sunrise Service Authority

(a) In order to afford the maximum uniformity in early morning operations compatible with interference considerations, the following classes of standard broadcast permittees and licensees are eligible to request Pre-sunrise Service Authority (PSA):

* * *

(b) When issued, a PSA will permit:

* * *

(2) Class III stations to commence operation with their daytime antenna systems at 6:00 a.m. local standard time, and to continue such operation until local sunrise: *Provided,* that the permissible power, to be specified in the PSA, shall not exceed 500 watts or such lesser power as may be determined on the basis of calculations made pursuant to paragraph (c) of this section.

(c) Notwithstanding the provisions of 1.571 and 1.580 of this chapter, requests for PSA's shall be treated as proposals for minor changes in existing facilities, and, as such are not subject to the procedural re-

on the one hand, particularly in situations where it has been in existence before and has come to be relied upon by listeners, and on the other hand, protection of the existing service of unlimited-time stations against an inordinate amount of loss through interference, and thus inefficient use of the channels involved. It is also apparent, as it has been for some time, that pre-sunrise use of daytime facilities by United States stations must be brought into line with this country's obligations, under pertinent international agreements, to protect the stations of other nations in the North American Region from objectionable interference. With respect to the regional channels, we are persuaded, after careful consideration of the record herein and the above considerations, that the most appropriate balance can be achieved by permitting virtually all Class III stations (daytime and fulltime) to operate pre-sunrise, from 6 AM standard time on, with 500-watts power, using their daytime modes of operation (directional or nondirectional), except where lesser power is required to meet international obligations as mentioned above.

17. In reaching this conclusion, we have taken into account the many considerations which have been so vigorously urged by those taking the various opposing positions, and the numerous counter-proposals, urged upon us. We recognize that, as many fulltime stations urge, permitting pre-sunrise operation by daytimers (and by fulltimers) may cause substantial interference to the licensed service of fulltime stations; it may well be true, as Storer and others urge, that the losses will often, perhaps usually, exceed the gains if strict engineering standards are applied. But in our judgment the record herein establishes that the pre-sunrise service rendered by daytime-only stations is, by and large, a valuable one, and one which should be permitted. In our view, as a

general proposition the gains out-weight the losses, when all factors, such as the location of the areas of service and interference with respect to the stations gaining and losing, and the extent of other service, are taken into account. We note the contention of Storer and others that rural areas will lose the badly needed service of wide-coverage fulltime regional stations. But we also note that, with few exceptions, the fulltimers did not establish the extent to which listeners in such areas (usually at some distance from the station) actually rely on and need their service. Their showing in this respect fell short of daytimers' showings.

18. Moreover, we take into account the other service which remains available to such "loss" areas from the same or nearby places, often including wide-area coverage by I-A and I-B clear channel stations, and wide-coverage FM service.[10] The daytimers assert that the fulltimers are located in large cities, with a plethora of locally originated services, and, while this is by no means always true, there appears, both from the record herein and our experience generally, to be a tendency in this direction. For example, as far as AM service is concerned, out of some 107 communities having fulltime Class III stations who filed formal or informal comments herein, 65 have other Class II or Class III fulltime AM service from stations in the same community (28 of these cities have wide-coverage I-A or I-B clear channel stations). Fourteen others have fulltime service from a local Class IV station, and 25 have no other local fulltime AM service (including 9 in urbanized areas and close to large cities with multiple services).

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[10] On several occasions in recent years—for example in Docket No. 15084 (the overall AM allocation proceeding)—we expressed the view that AM and FM should be viewed as complementary parts of a total aural service.

19. Of the 107 communities mentioned, all but 10 have wide-coverage Class B or C FM channels available (either assigned to the city or available under the "25 mile rule") on which wide-area coverage may be rendered from the city. Of the 10, three have Class A channels (two others are in urbanized areas and close to large cities with multiple AM and FM services). Taking into account both other fulltime AM service (besides Class IV) and wide-coverage FM service, only nine of these communities do not have such service available. More than half of the fulltime Class III stations – 68 out of 122 – have associated FM stations in the same community (or, in two cases, a nearby larger city); 65 of these are wide-coverage Class B or C assignments. Another 17 could take advantage of unoccupied channels, either assigned to the city or available under the "25 mile rule" (all but two Class B or C).[11]

20. In remarking on the fact that FM may thus be a means of overcoming the losses fulltime stations might incur through interference, we have not overlooked the fact – which NAFMB and others urged – that it may also be of value to daytimers in overcoming their pre-sunrise difficulties, as well as providing evening service. Out of some 135 Class III daytimers listed in Appendix C (excluding the 8 which have now become fulltime operations), some 53 are FM licensees or permittees, 19 of them Class A and the rest Class B or C (including two where the FM station is in a nearby city). There are unoccupied channels – usually Class A assignments – which some of the others could use. However, of the 135 communities involved, there are

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[11] The figures for the number of communities and licensees include CBS' Class III station at Boston, and ABC's Class III stations at Detroit, Los Angeles and Pittsburgh.

some 22 situations in which no assignment is provided in the FM Table for the community, it is not in an urbanized area, and it has no local fulltime AM service. There are other situations where no assignment is provided in the Table and the community has no fulltime local AM service, but it is part of an urbanized area. In some of these cases, channels might be available under the "25 mile rule", or possibly additional assignments might be made through rule making; but a substantial number of these situations are in areas where channels are scarce and the making of additional assignments is not always possible however desirable it might be. Thus, it appears that with respect to the communities represented in filings herein, the extent of FM service and potential – particularly for wide-area coverage – is greater for fulltime stations and their communities than it is for daytimers. We note also that many stations who particularly urged the value of wide coverage, both daytimers and fulltimers, are wide-coverage FM licensees or could become so. (*e.g.*, WMTM, KXXX, WSAU).

21. Thus, viewing the picture of aural service as a whole, we are convinced that permitting pre-sunrise operation by daytimers to the extent provided herein will result in the provision of service where there is more need for it than there is for whatever service may be lost in the areas where such losses occur. Bearing in mind that FM is not always available to daytimers even though it often is, and the present fairly modest development of that service, perhaps particularly in more remote areas, we do not believe that it affords the answer to the "pre-sunrise problem" as claimed by NAFMB. We do not conceive FM, at the present time, to afford the answer to supplying a needed pre-sunrise service which daytimers in outlying areas appear to render and which, we believe,

can be accommodated to the limited extent decided on herein without undue interference losses to licensed fulltime service. However, it can afford a valuable supplement to service during these hours, in two respects: giving daytimers, and fulltimers using daytime facilities, coverage comparable to that which they now have on AM using their full daytime facilities pre-sunrise (and which they might not have limited to 500 watts); and giving coverage where AM service is lost through interference. [12]

22. In sum, then, in our view we are making provision for service where it is most needed, in fulfillment of the mandates of Section 303(g) and 307(b) of the Communications Act. In evaluating the arguments concerning interference, two other factors should be

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[12] We are not adopting the approach urged in NAFMB's "Petition for Further Rule Making," filed herein on April 19, 1967, wherein we are urged to reappraise the need for "sub-standard, interference producing AM pre-sunrise operation" in light of our 1964 Report and Order in Docket No. 16084 (2 RR 2d 1659), the JTAC Radio Spectrum Utilization Report released the same year, and the substantial recent increase in the number of FM sets. As noted in Footnote 13 of the Docket No. 15084 Report and Order, the nighttime allocation principles there considered were concerned with "service through the evening and not. . .service during the hours immediately before sunrise [which is] the subject of a separate rule making in Docket No. 14419. . ." We will continue to give careful consideration to the development of FM and its proper role in the over-all aural service picture; and it may be that in the fairly near future it will be appropriate to propose some action along the line urged. But we do not believe it appropriate to postpone resolution of this long-standing and wide-ranging AM proceeding, and the many uncertainties existing as long as it is unresolved, while such an evaluation of the role of FM is conducted.

borne in mind. First, for the most part, the pre-sunrise service under consideration here – both by daytimers and fulltimers – is an existing service, and interference therefrom, while it has increased somewhat in recent years as more stations have been authorized, is not a phenomenon arising now for the first time. As mentioned above, on some regional frequencies there still has been no complaint against stations' pre-sunrise operation, and this was true of a majority of these frequencies as recently as three years ago. In other words, these conditions, however bad they may appear from a strict technical standpoint, are for the most part circumstances which the fulltime stations have been able to live with. The second point is that – by the 500-watt power ceiling now provided – we are taking action which may well *improve* present interference conditions on these channels, for example by sharply decreasing the interference from numerous 5 kilowatt daytime operations, by both daytimers and fulltimers.

23. We also note the contention of the fulltimers that the interference loss is being incurred for very little reason, because the daytimers' service areas are so severely limited during these hours. We do not believe that – bearing in mind that these are transitional hours – the service range is as limited as present technical standards might indicate. There may be merit in the argument – advanced by several daytimers and by fulltimers in support of using full daytime-facilities – that listener tolerance of interference in listening to news, weather, etc., is fairly high, higher than our traditional signal ratios contemplate. In any event, the service appears to be one – locally oriented – valuable enough to warrant provision for its rendition.

24. The Further Notice would have limited daytimer pre-sunrise operation to stations where there is no fulltimer in the community. Upon further consideration, we believe this restriction is unwarranted, even though permitting some additional operation may increase interference beyond what it would be otherwise.[13] Other daytimers may render valuable service, as indicated above, and, perhaps more important, just as much as with the "eligibles", it is often service upon which listeners have come to rely, often for a period of several years, so that termination would be disruptive. We are not persuaded that its termination is warranted. Moreover, as various parties pointed out, the fulltimers in town may not have the same service area as the daytimer – perhaps a substantially smaller one – and the proposal in this respect presented certain anomalies which might make it difficult to administer, such as cases where there are two daytimers in a community with no fulltimer, and cases where a fulltimer later goes into operation.

25. Although avoiding disruption of existing pre-sunrise service is an important factor in our decision, we do not believe it should be the only one. Other stations, for example those granted since early 1962 and conditioned against pre-sunrise operations, are likewise

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[13] The interference from the additional daytimers would not necessarily be great. One engineering firm made showings as to pre-sunrise interference on behalf of 9 fulltime regional stations (on 8 channels), under various conditions, including (1) "eligible" daytimers operating as proposed in the Further Notice (500 watts from 6 AM) and (2) *all* daytimers operating on that basis (fulltimers using night facilities in both cases). In 5 of the 9 cases the limit to the fulltimer would be the same under both conditions at all times; in the other four, the difference would usually be less than 2 mv/m, and only part of the time.

capable of rendering a valuable service during these hours, perhaps especially (though not necessarily entirely) when they are in places without fulltime outlets. The same applies to future authorizations. Therefore, we are not limiting pre-sunrise operation to those stations which have engaged in it before, or to presently authorized stations. In our judgment, with interference conditions improved on the various channels by reduction of pre-sunrise operation to 500 watts, the number of stations thus added will not materially worsen existing interference conditions.

26. If a great many stations are to be permitted pre-sunrise operation, as we have concluded they should be, some restriction on such operation must be imposed if an inordinate degree of interference is to be avoided. It is for this reason that we have decided to limit pre-sunrise operation, by daytimers or by fulltimers with daytime facilities, to no more than 500-wattspower (as mentioned above, the authorized mode of operation, non-directional or directional, will be used, although fulltimers may of course use their nighttime facilities if they prefer). This limitation will improve interference conditions in many cases, and 500-watts power appears sufficient to provide a generally adequate service to the communities involved. To a degree, of course, this reduction may mean loss of existing service, which has come to be relied upon. But if it is true that "distant" stations are not of significance to listeners at a particular place if they are fulltimers (which the daytimers urge with respect to interference), it is likely equally true that listener interest in daytimers generally decreases with distance, so that a 5-kilowatt operation may not be rendering a really significant pre-sunrise service out to the bounds of its normal daytime service area. Moreover, while power greater than 500 watts is not precluded as

such by the understanding with Canada, it appears highly unlikely that many operations with power much more than that could comply with the arrangement with Canada and applicable treaties with other countries. In connection with this limitation, as well as with the limitation to 6 AM mentioned below, we also note the significance of the FM service, mentioned above. If stations seek greater coverage pre-sunrise than 500 watts would permit, they must rely on the companion aural service.

27. Likewise, we are convinced that pre-sunrise operation must be confined to 6 AM (local standard time) and after. We reach this conclusion on the basis of the record herein, which, despite the assertions and showings of some stations to the contrary, does not persuade us that earlier operation has enough public interest to warrant the extensive interference entailed during earlier hours when skywave propagation and interference conditions more closely approach, or equal, full nighttime conditions. In any event, earlier operation is precluded by our understanding with Canada.

28. In reaching these conclusions as to limitations, we have rejected the contentions of some parties that the limits should be more restrictive, such as 250 watts and 7 AM. The fact that 250 watts is the pre-sunrise power of Class IV stations does not mean that it should be for regional stations, which are designed to serve wider areas. 500 watts appears to be both necessary to provide adequate pre-sunrise service, and sufficiently low to avoid excessive interference. We do not believe that a 7 AM sign-on is sufficiently early to meet the need for local informational service which has been demonstrated herein.

29. We have likewise concluded that fulltime stations should be allowed to use daytime facilities

before sunrise to the same extent. We are impressed by the arguments made (*e.g.*, that of WLOS) that such facilities, even if operated with only 500 watts, may well provide better service to the city and its environs during these important hours. In addition, such operation will afford fulltimers some additional protection against interference from daytimer pre-sunrise operation. The limitation to 500 watts and 6 AM is necessary for the same reasons mentioned above for daytimers; again, we call attention to the availability of FM for wider coverage. Many fulltimers commenting on this point (*e.g.*, WSAU) are or can become FM licensees, often on wide-coverage channels, and thus render wide-area service.

30. We must reject the arguments and counterproposals of ABS and other parties, that a case-by-case approach must be used in this matter. Such an approach—taking into account that there are some 1,200 daytimers and 858 fulltime Class III stations—is simply out of the question from an administrative standpoint. The number of potential hearings involved staggers the imagination, and they would in all probability become exceedingly complex, since (with skywave interference involved) more than one daytimer usually affects a given fulltimer and, conversely, a given daytimer may affect more than one fulltimer. A given hearing situation might well end up involving a considerable number of the stations on a channel, including a comparative inquiry into which pre-sunrise operation should be permitted and which precluded. Not only would this entail an inconceivable burden, both on the Commission and on standard broadcast stations and their advisers, it would take a great amount of time, a consideration inconsistent with our view that the public interest clearly requires a reasonably prompt resolution

of the "pre-sunrise" situation and the widespread uncertainties currently involved in it. We do not conceive that a more particularized approach, either by hearing or otherwise, would throw significantly more light on the appropriate course of action in a given situation, anything like enough to warrant the burden involved.

31. Likewise, we must reject the arguments of those who favor the traditional 73.87 *status quo*, with its complaint and ensuing termination procedure. While it might have been a true statement five years ago that the rule has worked "reasonably well," it is hardly so today, with the large number of complaints which have been filed in recent years. We believe that the uncertainties involved in pre-sunrise operation, as they have developed recently, must be resolved, so that all parties know where they stand. Moreover, such an approach is inconsistent with this country's international obligations to prevent objectionable interference to duly notified foreign stations.

32. *Legal matters:* It was contended that 73.87 is a part of a station's license, so that we cannot order termination or reduction in a pre-sunrise operation without complaint. This is without merit. The rule speaks of termination upon notice from the Commission that "undue interference" is caused, and in *Music Broadcasting Co. v. FCC,* 217 F. (2d) 339 (1954), this was held to mean objectionable interference as determined under the usual nighttime interference rules. While we have in the past ordered termination or reduction only after complaint, the rule does not require this, and certainly this agency has the power to take steps to alleviate interference conditions on a channel on its own motion, even in the absence of complaint. To hold otherwise would be to negate our power to act in the public interest to further the more effective use of

radio. There are virtually no pre-sunrise operations with full daytime facilities which are free from objectionable interference effects on licensed fulltime stations, using our regular nighttime interference rules. Therefore we have the power to terminate or cut back such operations—which are permissive, not licensed—without hearing or other proceedings.

33. In the Further Notice we posed the question of whether Section 316 of the Communications Act—precluding modification of a license without a hearing—applies to the present situation where, after a general rule making proceeding, certain pre-sunrise operation may be permitted on an authorized basis, resulting in interference to some fulltime stations. Many parties urged that it does, and that they will insist on their 316 hearing rights in connection with such operation.[14] We conclude that it does not. Of course

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[14] It was argued that *Transcontinent Television Corporation v. FCC*, 308 F. (2d) 339 (1962)—which affirmed our authority to change a station's channel at the end of its license period without an evidentiary hearing—is not authority for the type of action contemplated here, even at the expiration of an outstanding license, for one reason because that case involved a detailed exploration in rule making of one particular situation. We do not agree with these arguments, particularly in light of the subsequent decision in *The Goodwill Stations, Inc. v. FCC*, 325 F. (2d) 637 (1963), affirming our Clear Channel decision. As indicated above, the pre-sunrise rule making is a proceeding of general applicability. As such, we hold its impact on individual applicants, permittees, and licensees confers no adjudicatory hearing rights under Section 316 of the Communications Act. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Airline Pilots Association v. Quesada*, 276 F. 2d 892 (1906); *Federal Power Commission v. Texaco*, 377 U.S. 33 (1963); *California Citizens Band Association v. USA and FCC*, 9th Circuit, Case No. 20,030 (1967).

this Commission cannot finally determine the statutory legal rights of licensees as against its regulatory authority; this is for the courts. But it is our duty to construe the Act to the best of our ability, in light of pertinent court decisions. For present purposes, we view the recent decision in *American Airlines, Inc. v. CAB*, 359 F. (2d) 624 (C.A.D.C. 1966) as authority for the proposition that we can "modify" existing licenses with respect to interference received by stations—if "modify" is the appropriate term —, through a general rule making proceeding, and that Section 316 does not apply. It must be borne in mind that this is a rule making proceeding of general applicability, affecting many stations on many channels, exactly the type of proceeding the Court considered in that case. In this respect it is clearly distinguishable from *FCC v. National Broadcasting Company (KOA)*, 319 U.S. 239 (1943), from which the concept of "modification through interference" stems. That was a particular proceeding involving the assignment of one station (WHDH, Boston) to KOA's frequency at night for the first time, resulting in substantial interference to what had been until then a Class I-A station. Therefore we do not view *KOA* as a reason for postponing the effectiveness of the new rules, and are making them effective as quickly as possible.

34. *Class I-B and Class II stations:* As mentioned in the Report and Order (par. 18), and for the reasons stated therein, the rules adopted do not provide for pre-sunrise use of daytime facilities by Class I-B stations. See *Storer Broadcasting Company*, 1 F.C.C. 2d 1954 (1965).

35. With respect to pre-sunrise operation by Class II stations, as mentioned above the original Notice herein would have precluded it completely; the Further Notice would have precluded it except for daytime-only and

limited-time stations on U.S. I-A channels (and I-B channels having no foreign I-B stations), located west of all of the dominant co-channel stations. Upon further consideration and review of the comments filed, we are of the view that these proposals would be unduly restrictive and prevent the rendition of significant service. It is, of course, of great importance to protect the skywave and wide-area groundwave service of Class I stations; but in our judgment this can be achieved, if pre-sunrise is limited in extent as discussed below, without precluding some other categories of stations from pre-sunrise operation. Therefore, the rules adopted herein will permit pre-sunrise operation by: (1) Class II stations (daytime, limited-time and fulltime) located west of all co-channel dominant stations, starting at sunrise at the location of the westernmost foreign or domestic dominant station (or 6 AM local standard time, whichever is later);[15] and (2) operation from 6 AM local time by daytime and fulltime stations on Class I-B channels regardless of location, if they protect the 0.5 mv/m 50% skywave contours of domestic and foreign co-channel Class I stations located to the west. Reduced power may be used if necessary to afford such protection. Certain requests by Class II stations in other situations must be rejected as inconsistent with overall allocations efficiency and the public interest.[16]

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[15] This, of course, does not include daytime-only Class II stations on foreign I-A channels, which are not now permitted to operate pre-sunrise and are not within the scope of this proceeding.

[16] Thus, if Class I-A stations' skywave service is to be protected, as we believe it must be, we cannot permit pre-sunrise operation by a Class II station to the east of a co-channel Class I-A station; and, since we have provided that Class I-B stations must use nighttime facilities until local sunrise, we reject requests from Class

(Cont'd on p. 47)

36. With respect to the limitation to 6 AM and after, this of course is required by the terms of the understanding with Canada mentioned in the Report and Order. We believe it is also appropriate from a domestic standpoint, just as with the regional channels, since operation at an earlier hour, when propagation conditions more nearly approach full nighttime conditions, is the source of more substantial interference (see paragraphs 14 and 15 and footnote 9 above). Therefore, pre-sunrise operation by Class II stations will be limited to 6 AM, local standard time, and after, just as that by Class III stations.

37. With respect to the I-B channels, it is also appropriate to impose the same 500-watt restriction adopted for the regional channels. This is necessary to prevent excessive interference from higher-power operations, and afford an adequate degree of protection to Class I-B and unlimited-time Class II stations. This is particularly true since Class I-B stations will not be permitted pre-sunrise use of daytime facilities (see Report and Order, paragraph 18).

38. Tentatively, we are of the same view that the same 500-watt restriction should apply to pre-sunrise operation by Class II stations on the U.S. I-A channels (see, for example, the situation escribed in footnoe 9, above). However, since this particular subject has not been explored, and since to some extent different conditions obtain on these frequencies (fewer Class II stations, much smaller foreign protection requirements, and the fact that

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(Cont'd from p. 46)

II stations based on the fact that the I-B station to the west of them was in fact using its daytime facilities. As far as interference to fulltime Class II stations is concerned, we are of the view that in this respect the same considerations apply as on the regional channels, and that pre-sunrise operation serves a valuable purpose and should be permitted to the extent provided herein.

under present assignment rules there can be no more daytime stations) we are not adopting it at this time. Such a restriction on Class II stations on these channels is proposed in a Notice of Proposed Rule Making adopted today.

39. The question of interference to U.S. Class I-B stations located west of the Class II station, to all fulltime co-channel stations in North American countries other than Canada, and to Canadian I-B stations, will continue to be determined by conventional nighttime propagation standards. As to permissible radiation toward co-channel Canadian fulltime Class II stations, the curves contained in new Figure 12 of 73.190 will apply. If necessary to meet any of these requirements, stations may operate with power less than 500 watts and make pre-sunrise requests on the basis of such lower power.

40. *Other matters: diurnal curves:* The Further Notice herein proposed a family of diurnal curves, taking into account the fact that the appropriate reducing factor applicable to conventional nighttime interference calculations for any particular point in time during the two hours before sunrise. Use of these curves would show less interference than conventional nighttime computations. However, their validity was attacked, chiefly on the ground that (based on data concerning post-sunset conditions) they do not accurately represent pre-sunrise conditions. A substantial question appears to exist as to their accuracy. Moreover, their use is quite complex, and they have no international standing. In our view, an appropriate resolution of this proceeding is possible without them, and therefore they are not adopted herein.[17]

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[17] On July 15, 1966, ABS filed further comments containing measurement data intended to show that the diurnal attenuation

(Cont'd on p. 49)

41. *Directional or nondirectional pre-sunrise operation.* The Further Notice proposed operation by "eligible" Class III daytimers with 500 watts nondirectionally, even though their authorized facilities might be directional. Some parties attacked this, for one reason because it would produce an artificial service area for a short time during only part of the year, which the directional station would not have at other times, leading to confusion. For this reason, and also because of the added burden involved in specifying an additional mode of operation, we agree with the objecting parties and are providing herein for use of the authorized daytime mode of operation, directional or nondirectional.

(Cont'd from p. 48)

factors for sunrise and sunset transitional periods are not symmetrical, and, specifically, that morning propagation conditions (referred to sunrise at the path midpoint) are more favorable to undesired 10% skywave interfering signals than are evening propagation conditions (referred to sunset at the path midpoint). As stated in the text, we recognize on the basis of the earlier material filed that this factor raises a question as to the proposed curves' validity, and this is one reason for not adopting them as a pre-sunrise tool. We have also pointed out that individual skywave measurements, or series of measurements, are not appropriate as a basis for determining skywave service and interferences (*Amendment of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations,* (Skywave Measurements), 10 R.R. 1562 (1954). Therefore, this extremely late-filed matter, and DBA's motion to strike it, need not be considered. We are of the view that the approaches adopted herein—sign-on time and power limitations, together with the conventional nighttime skywave standards on the clear channels where skywave service is to be protected—are the most appropriate and perhaps the only workable, concepts of pre-sunrise regulation. ABS' suggestion that the proceeding be further delayed while more measurements are taken and analyzed must be rejected, if this long-standing and important proceeding is to be terminated in a reasonable time. The same applies to "Supplemental Comments" filed by ABS on February 23, 1967, containing additional engineering material.

APPENDIX B

Part 73 of the Commission's Rules is amended as follows:

1. Section 73.87 is amended to read as follows:

73.87 *Program transmissions prior to local sunrise.*

Except as provided in 73.98 and 73.99, no standard broadcast station shall operate at times, or with modes or powers, other than those specified in the basic instrument of authorization.

2. A new 73.99 is added to read as follows:

73.99 *Pre-sunrise Service Authority.*

(a) In order to afford the maximum uniformity in early morning operations compatible with interference considerations, the following classes of standard broadcast permittees and licensees are eligible to request Pre-sunrise Service Authority (PSA):

(1) Class II stations except those operating on Class I-A Clear Channels not assigned to the United States under the North American Regional Broadcasting Agreement (NARBA) or the US/Mexican Agreement, and those assigned to U.S. I-A clear channels and located east of the co-channel I-A station.

(2) Class III stations.

(b) When issued, a PSA will permit:

(1) Class II stations to commence operation with their daytime antenna systems either at 6:00 a.m. local standard time or at sunrise at the westernmost Class I station

located east or the Class II station (whichever is later), and to continue such operation until local sunrise: *Provided,* That the permissible power, to be specified in the PSA, shall not exceed 500 watts (or the authorized daytime or critical hours power, if less than 500 watts), or such lesser power as may be determined on the basis of calculations made pursuant to paragraph (c) of this section.

NOTE: Pending decision in Docket 17562, Class II stations on U.S. I-A channels, located west of the co-channel dominant station, may operate with their facilities licensed for use immediately after local sunrise without limitation to 500 watts power. Applications by such stations for PSA's will not be required until that proceeding is resolved, but pre-sunrise operation may not begin prior to 6:00 a.m. local standard time.

(2) Class III stations to commence operation with their daytime antenna systems at 6:00 a.m. local standard time, and to continue such operation until local sunrise: *Provided,* That the permissible power, to be specified in the PSA, shall not exceed 500 watts or such lesser power as may be determined on the basis of calculations made pursuant to paragraph (c) of this section.

(c) Notwithstanding the provisions of 1.571 and 1.580 of this chapter, requests for PSA's shall be treated as proposals for minor changes in

existing facilities and, as such, are not subject to the procedural requirements or remedies applicable to applications for new facilities and major changes therein. PSA requests shall be submitted by letter, signed in the manner specified in 1.513 of this chapter, with the following information:

(1) Name, call letters and station location.

(2) For Class II stations, a showing that objectionable interference, as determined by the Standard Broadcast Technical Standards of this subpart or by the engineering standards of the NARBA or the US/Mexican Agreement (whichever is controlling), will not be caused within the 0.5 mv/m 50 per cent skywave contour of any domestic or foreign Class I-B Clear Channel station located west of the Class II station. In addition, the applicant must show that foreign Class II stations (if any) assigned to the same channel will receive full treaty protection. If the foregoing protections cannot be achieved on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced to preclude objectionable interference: *Provided,* That with respect to Canadian Class II stations, permissible radiation may be established by the use of Figure 12 of 73.190, in the manner described in paragraph (c)(3) of this section.

(3) For Class III stations, a showing that co-channel stations in foreign countries

will receive full treaty protection. If such protection cannot be achieved on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced to preclude objectionable interference: *Provided,* That with respect to Canadian Class III stations, such power level may be established by a showing that the radiation at the pertinent vertical angle toward co-channel Canadian stations does not exceed that defined in Figure 12 of 73.190. If the latter showing cannot be made on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced in order to limit radiation at the pertinent vertical angle to the values specified in Figure 12 of 73.190.

(4) A description of the method whereby any proposed power reduction will be achieved.

(d) Calculations made under paragraph (c) of this section shall not take outstanding PSA's into account, nor shall the grant of a PSA confer any degree of interference protection on the holder thereof.

(e) Operation under a PSA is not mandatory, and will not be included in determining compliance with the requirements of 73.71. To the extent actually undertaken, however, pre-sunrise operation will be considered by the Commission in determining overall compliance

with past programming representations and station policy concerning commercial matter.

(f) The PSA is secondary to the basic instrument of authorization and may be suspended, modified, or withdrawn by the Commission without prior notice or right to hearing, if necessary to resolve interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action.

(g) The PSA will be issued for a term coinciding with the current basic instrument of authorization and, unless surrendered by the holder or suspended, modified or withdrawn by the Commission, will have continuing or renewed effect under succeeding instruments.

(h) The issuance of a PSA is intended to include the waiver of 73.45, 73.182, and 73.188 in situations where the operation might otherwise be considered as technically substandard. However, such special conditions as the Commission may deem appropriate may be included in the PSA to insure the operation of the transmitter and associated equipment in accordance with all phases of good engineering practice.

(i) In the event of permanent discontinuance of pre-sunrise operation, the PSA shall be forwarded to the Commission's Washington office for cancellation, and the Engineer-in-Charge of the radio district in which the station is located shall be notified accordingly.

3. Section 73.190 is amended by the addition of Figure 12 and by amending the text to read as follows:

73.190 *Engineering charts.*

This section consists of the following figures: 1, 1a, 2, R3, 5, 6, 6a, 7, 8, 9, 10, 11, and 12.

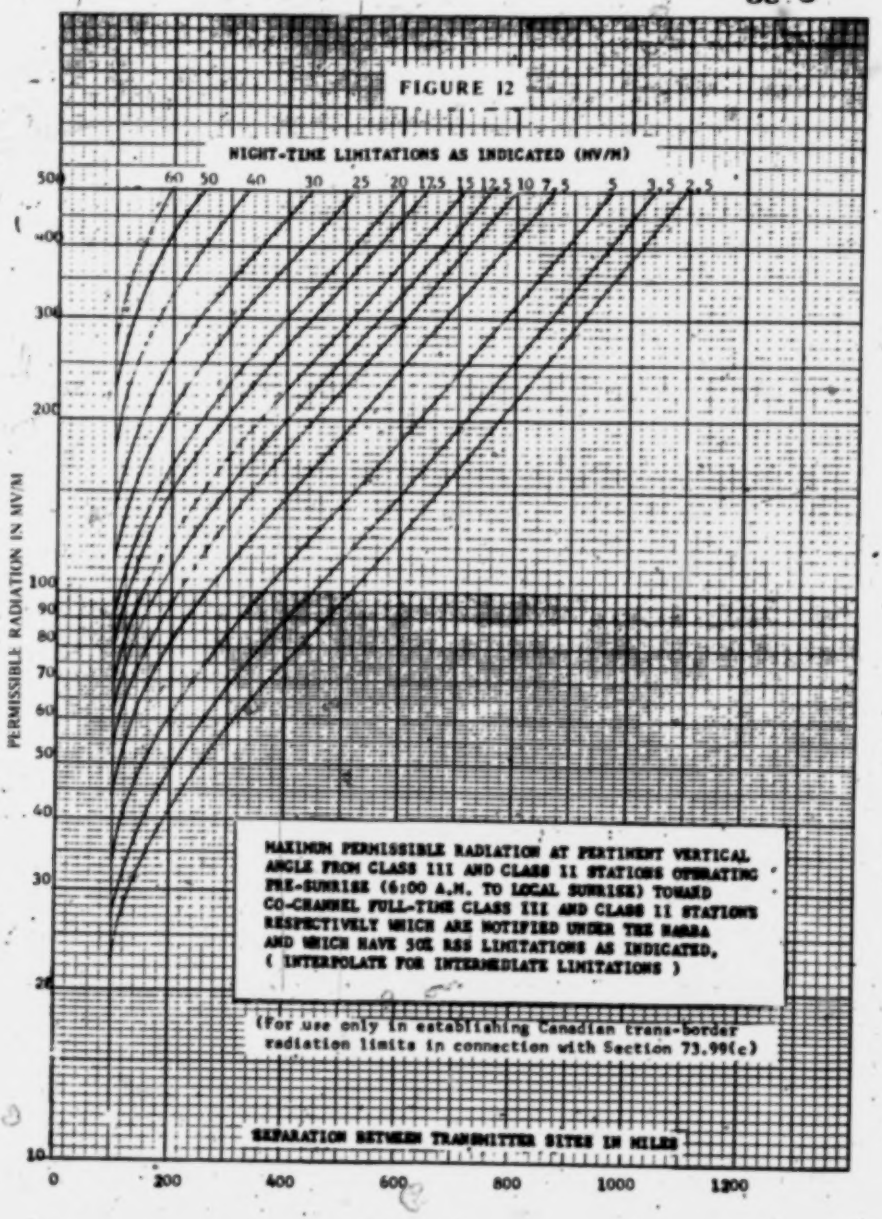
FIGURE 12
NIGHT-TIME LIMITATIONS AS INDICATED (MV/M)
60 50 40 30 25 20 17.5 15 12.5 10 7.5 5 3.5 2.5
PERMISSIBLE RADIATION IN MV/M
500
400
300
200
100
90
80
70
60
50
40
30
20
10
MAXIMUM PERMISSIBLE RADIATION AT PERTINENT VERTICAL ANGLE FROM CLASS III AND CLASS II STATIONS OPERATING PRE-SUNRISE (6:00 A.M. TO LOCAL SUNRISE) TOWARD CO-CHANNEL FULL-TIME CLASS III AND CLASS II STATIONS RESPECTIVELY WHICH ARE NOTIFIED UNDER THE HABRA AND WHICH HAVE 50% RSS LIMITATIONS AS INDICATED. (INTERPOLATE FOR INTERMEDIATE LIMITATIONS)
(For use only in establishing Canadian trans-border radiation limits in connection with Section 73.99(c)
SEPARATION BETWEEN TRANSMITTER SITES IN MILES
0
200
400
600
800
1000
1200

APPENDIX C

In response to the Further Notice of Proposed Rule Making herein, comments and/or reply comments were filed by the following industry associations: Association of Federal Communications Consulting Engineers, Association of Maximum Service Telecasters, Association on Broadcasting Standards, Inc., Clear Channel Broadcasting Service, Daytime Broadcasters Association, and National Association of FM Broadcasters. Comments were also filed by or on behalf of A. Earl Cullum, Jr. & Associates (consulting engineers), American Broadcasting Companies (on behalf of the three ABC fulltime regional stations), Columbia Broadcasting System, Inc., and the licensees of the following stations:[1]

KABL	KACY	KAKC	KALL	KALN	KAPE	KBBB
KBEA	KBOX	KBRC	KBRL	KBRZ	KBSN(KCRM)	
KBTM	KCOH	KCSR	KCUE	KDAV	KDMS	KDOK
KVAX	KFIV	KFKF	KFRD	KFRE	KFRM	KFSA
KGBS	KGEM	KGHL	KGIL	KGLO	KGNS	KGST
KHQ	KHSL	KIDO	KING	KIFG	KILT	KISN
KIT	KJCK	KKOK	KLAC	KLIK	KLIX	KLO
KLOK	KLYD	KMA	KMBC	KMDO	KMMO	KNCY

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[1] Call letters are those as of April 1967, which are generally those appearing in the 1967 *Broadcasting Yearbook*. Where the station had different call letters when it filed in this proceeding, the old call letters are given in parentheses. The list includes all stations filing formal comments (which are the vast majority of those listed), and some 20 other stations, all those as to which informal submissions were made through June 17, 1963 (the time for reply comments) except 8 stations which are daytime Class II's on foreign I-A clear channels and thus outside the scope of the proceeding (KCHI, KLTR, WITZ, WKKD, WKRS, WLIJ, WLIL and WZIP). In the case of multiple owners, the only stations listed are those mentioned in the comments as being involved in the proceeding.

KNGS KNOK KNOP KOIL KOKY KOLO KOOK
KORD KOSI KOTE KPAC KPAM KPBA KPEP
KPLC KPOJ KQRS(KEVE) KREM KRNT KRNY
KROX KSBW KSCO KSEM KSFO KTAC KTAR
KTHO KTLW KTOE KTRN KTSA KTTN KTTR
KTYM KUSN KUTI KUTY KVCV KVI KVIL
KWAT KWBB KWIZ KWPC KWPM KWUN KWYR
KXRO KXRX KXXX KXYZ KYA KYUM KZIP
WAAA WAAF WABI WAEW WAGM WAIT WAKR
WALD WALK WANV(WBVA) WARE WASA WAZS
WBAA WBEN WBIS WBLF WBMK WBRN WCAP
WCAT WCCW WCDL WCEN WCGO WCHA WCHK
WCLD WCLT WCMB WCSH WCUE WCVP WDAF
WDAL WDKD WDLM WDSU WDXE WEAW WEBL(WHHL)
WEBO WELW WELZ WENN WENO WEOK WESR
WEUP WFAA WFBR WFIN WFLA WFLS WFMD
WFMJ WFYC WGAR WGGO WGHQ WGL WGR
WGUS WHEE WHEO WHFB WHIL WHIO WHIP
WHK WHLN WHOM WHOP WHSM WHUN WHYD(WGBA)
WIBC WIBW WIFE(WISH) WIL WIOD WION
WIP WIPS WISN WIVE(WDYL) WIXY(WDOK)
WJAY WJBL WJBO WJDA WJMC WJOT WJRZ
WKAI WKAN WKMF WKLO WKST WKY WLAQ
WLBK WLBN WLBZ WLES WLET WLIK WLOB
WLOS WLOW WLPM WLTC WLTH(WGRY) WMAX
WMBD WMCA WMCH WMGO(WDOB) WMMW WMNS
WMRC WMRE WMSR WMTM WMTR WMUU WMVB
WNAE WNAM WNCG WNEW WNUS(WYNR) WOIB(WOIA)
WOIC WOKJ WOKW WORK WOW WPFB WPNC
WPRC WPRS WQIK WQXI WRAA WRAG WREC
WRIV WRKL WRNL WRSW WRTL WRUS WSAI
WSAU WSBT WSCM WSIV WSHP WSJS WSKI
WSOC WSON WSPD WSPR WSVL WSYR WTAD
WTAE(WRYT) WTHI WTMB WTPR WTTT WTUX
WTVB WTVR(WMBG) WVAM KVIP WVOP WWAB(WYSE)
WWBD WWOK WWNY WXLY WYAL WYNZ WZOK
WZXX WEZK WIKI WSJC

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART AND DISSENTING IN PART

I concur with most of what is done here, but dissent to the extension of pre-sunrise privileges to existing and future stations which have never exercised such rights. There are some 500 daytime-only stations which have been licensed during the pendency of this proceeding subject to the condition that they not operate pre-sunrise until disposition of this matter. As a consequence, they have not geared their operations to such extended hours, nor has the public in their areas come to rely on such extended service. To permit these stations now to begin such service will produce additional interference to existing broadcast stations, even though in many cases there is no real need for the added pre-sunrise service because of the presence of other local stations. I think this is improvident.

In other words, I am willing to go to considerable lengths to accommodate previously licensed stations which have engaged in this mode of operation, but I do not believe it desirable to extend such operations—either to the 500 who now have permits or licenses conditioned against pre-sunrise operation or to those who may apply for daytime stations in the future. These parties have acted with knowledge of the Commission's concern in this area, do not have equities comparable to those of pre-existing stations, and have not led audiences to rely on pre-sunrise service. It seems particularly unwise to continue to license daytime stations unless the applicants therefor are really prepared to operate just from sunrise to sunset.

MEMORANDUM OPINION AND ORDER

FCC 67-1143
6443

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1967; Released: October 17, 1967

By the Commission:

Commissioners Bartley and Wadsworth absent; Commissioner Cox concurring in part and dissenting in part and issuing a statement; Commissioner Johnson not participating.

1. The Commission here has under consideration 23 petitions for reconsideration of the Report and Order and new rules adopted in the long-standing "pre-sunrise" proceeding (8 FCC 2d 698, 10 R.R. 2d 1580, adopted June 28 and released July 13, 1967). Briefly, in that decision we abandoned the "permissive" use of daytime facilities before local sunrise by Class III stations (those on regional channels) and many Class II stations, both those licensed for daytime-only operation and unlimited time stations having different day and night facilities, which had prevailed under former Section 73.87 since 1941. Under that arrangement, such stations could use their full daytime facilities before local sunrise, as early as 4 AM local standard time, unless and until such operation was terminated as a source of objectionable interference to an unlimited time station's licensed operation.[1] The decision substituted a licensing concept,

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[1] The permissive provisions of Section 73.87 did not extend to Class III and Class II facilities authorized after January 1962, which were specifically conditioned against pre-sunrise operation during the pendency of this proceeding.

Although 73.87 did not specifically so state, as it was administered, Commission orders terminating a station's pre-sunrise operation were issued only on the basis of complaints by fulltime stations of interference to their licensed nighttime operations, after such complaints were examined by the staff and found to be well-founded under conventional nighttime propagation standards.

contained in new Section 73.99, under which such operation is specifically authorized under a Pre-Sunrise Operating Authority (PSA) from the Commission. PSA's are limited to 6 AM (local standard time) and after (with other restrictions on time as to Class II stations), and, regardless of the power authorized for daytime use, are limited to either 500 watts or whatever lesser power must be used to afford the required degree of protection to co-channel foreign stations. Domestic interference is not evaluated, it being minimized by the across-the-board 500-watt limitation.

2. The petitioning parties are listed in the Appendix hereto. They include Association on Broadcasting Standards, Inc. (ABS, a group of full-time Class II and Class III stations);[2] Daytime Broadcasters Association (DBA, a group of daytime-only stations); Clear Channel Broadcasting Service (CCBS, a group of 11 Class I-A clear channel stations); A. Earl Cullum, Jr. & Associates (a consulting engineering firm seeking only a modification or waiver of the remote control rule requirements); and numerous individual licensees (including Class III daytimers, Class II daytime-only or limited-time stations, and fulltime Class III stations). As discussed below, except for ABS, CCBS and Cullum (and

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[2] The ABS petition, which is 55 pages long, does not comply with Section 1.106(f) of the Rules, which limits petitions for reconsideration to 25 pages. On August 31, 1967, ABS filed a request asking that its petition be considered despite its length, stating that this request was inadvertently omitted when the petition was filed. This statement was served on all other petitioners and has not been opposed. Considering the wide-ranging character of the decision, and also the fact that much of the petition consists of quotations and other historical material which could have been put in an appendix and would have been accepted as such, grant of the request appears appropriate.

to a very limited extent fulltime Station KMA, Shenandoah, Iowa) the basis for the opposition to the new provisions is that they involve restrictions on pre-sunrise use of daytime facilities compared to what these stations have done in the past under 73.87, without being the subject of complaint. ABS is concerned about this and also about the effects of interference from pre-sunrise operations; CCBS is concerned about interference to the service of I-A stations.[3]

3. Before discussing the pleadings in detail, we note one point raised in some of them, as well as in numerous informal objections to the new rule and requests for waiver. This is that, for daytimers, the rule provides for sign-on at 6 AM *local standard time* (*i.e.*, what is sometimes called "non-advanced" time, without the one-hour advancement during the "daylight-saving time" period). This is 7 AM *local time* during half of the year, since, following adoption of the Uniform Time Act of 1966, "advanced" time has become all but universal in

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[3] Oppositions and other responses to the petitions were filed by CCBS, KFI (Los Angeles Class I-A), Storer Broadcasting Company (participating herein on behalf of WSPD, Toledo, and KGMS, Los Angeles), and KFAX, San Francisco. Replies to oppositions were filed by four daytime-only stations opposing Storer, and by two Class II stations (KOWH and WHLO). These pleadings relate chiefly to the Class I-A clear channels.

The Commission has also received a large number of informal petitions for reconsideration, formal and informal requests for waiver, objections, protests, etc., in relation to the new rule. These are not specifically dealt with herein, but the general guidelines for dealing with them are set forth. By and large, they involve the same arguments and situations as did the formal petitions for reconsideration.

the conterminous 48 states.[4] This is not usually a significant problem in May, June and July, when local sunrise is generally 5 AM (non-advanced time, or 6 AM advanced time) or earlier; but it is an important matter in October, when in general it means that daytimers cannot sign on before 7 AM local time during most of the month, and to a lesser extent in September, August and late April. This, it is urged, is simply too late in terms of the listening habits of the community.

4. We recognize this problem, and are attempting to deal with it. As we stated in the decision (Report and Order, Appendix A, par. 28), a 7 AM sign-on does not appear sufficiently early to meet the need for local informational services which this proceeding has demonstrated. While the months involved are perhaps not those in which pre-sunrise operation is most valuable to the public or to the station (as valuable, for example, as winter months of adverse weather conditions and the high commercial activity of the pre-Christmas period), we recognize the desirability of a uniform 6:00 AM sign-on. In keeping with traditional methods of expressing "sun time," the agreement with Canada concerning pre-sunrise operation (TIAS 6268, formalized June 12, 1967) specifies 6 AM local standard time. We cannot unilaterally depart from it. However, steps are under way to explore with Canada the possibility of redefining the agreement in terms *prevailing local time*.[5] Overall, it is

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[4] Although there seems to be some misunderstanding on the point, licensees may of course sign on at local sunrise when that is earlier than 6 AM, as it is during a substantial part of the year. PSA's are only intended to afford relief during other months when sunrise occurs later.

[5] This would, of course, expose fulltime stations (both domestic and foreign) to some additional skywave interference during certain months of the year, varying widely from station to station and channel to channel.

not believed that this would result in conditions of materially increased interference, since (as some parties point out), during the "advanced time" months (except for October), 6 AM local time is at least as close to local sunrise as is 6 AM standard time in winter. We propose to explore this matter with Canada in the near future.

5.DBA petition: DBA, while approving what it characterizes as our recognition for the first time that engineering yardsticks are merely one tool for, and the servant and not the master of, public interest determinations, urges that we did not go far enough, and that, while adopting the philosophy of the House of Representatives in enacting H.R. 4749[6] in 1962, in the interest of "compromise" we failed to carry this

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[6] H.R. 4749 passed the House but was not acted on by the Senate and therefore died with the 87th Congress. Paragraphs (a) and (b) of the bill provided that (subject to international considerations) stations could use their daytime facilities starting at 6 AM (local standard time), or 4 AM if they had done so before, but not where a fulltime station in the same community, operating with licensed nighttime facilities, served the same area; a fulltime station showing harmful interference from such operation (a fairly substantial showing was required) could get a hearing, but the offending operation could be modified or terminated only after a showing in the hearing of such interferency and that the action would serve the public interest. Under other paragraphs, daytime-only stations not eligible under the above could apply for pre-sunrise operation and get it if the Commission determines that harmful interference to a substantial portion of another station's service area would not be caused; and the Commission was authorized to permit, by rule, daytime-only stations to operate pre-sunrise and post-sunset (with or without application). The bill's language probably did, as DBA asserts, represent a relaxation of existing standards as to what is objectionable interference; it did not require reduction in power of pre-sunrise operations, and it made no distinction between regional stations and Class II stations on clear channels.

philosophy to a logical result. Its objection is to what is described as the "disastrous consequences of such rules on the public," through the reduction in existing pre-sunrise operations they require. It is asserted that, while recognizing the necessity for and value of pre-sunrise operation by daytimers, we failed to give it enough weight. It is said that consistency requires that if interference among U.S. regional stations is to be of no concern, reduction in time and power used for years without complaint is not necessary, and, *a fortiori*, interference to the service of very distant clear-channel stations should be similarly treated. It is stated that the cutback in power to 500 watts will cause loss of vital services in surrounding areas and even stations' own communities, and that the limitation to 6 AM will affect "a great preponderance" of daytime stations (particularly in rural areas having no fulltime local service) which have been signing on at 4 or 5 AM. It is also asserted that the reduction in power will be costly (sometimes requiring a new transmitter) and that many stations will have to reduce power to a level so far below 500 watts that pre-sunrise operation will be useless both economically and in terms of service. Only two groups of stations, it is said, would benefit from the new rules: those ordered terminated because of complaint, and those granted in recent years and automatically conditioned against pre-sunrise operation.

6. Claiming that the Commission acted without sufficient information (particularly as to the prevalence of operation before 6 AM),[7] DBA asks that: (1) the Commission adopt the approach taken in H.R. 4749 (see

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[7] It is asserted that daytimers do not have the resources to present information in formal filings to the Commission, and, also, that some of them were not aware of the proposal for Class II stations.

footnote 6, above), except that its benefits not be limited to stations in communities without a fulltime station (a distinction we found to present too many anomalies to be desirable); or (2) to stay the rules for six months insofar as they would require any reduction in existing pre-sunrise operations by daytimers or fulltimers, and in the meantime conduct a searching inquiry, by questionnaire of all stations, as to the extent of pre-sunrise operation, nature of the programming presented and reliance on it, the losses therein entailed by the curtailments required by the rules, the extent to which fulltime stations received "objectionable interference" from such operation programmed for the "loss" areas and the extent to which listeners therein have complained, and the effect of the rules on the economic ability of daytimers to compete with fulltimers and to provide local programming in the public interest. A similar inquiry of clear channel stations is requested, as to their programming aimed at potential interference "loss" areas. DBA asks that the rules be allowed to stand as to stations which have not operated pre-sunrise recently (the two groups mentioned above). As to the Canadian question, DBA notes that the July 1, 1967 effective date specified in the agreement has already been waived, and asserts that since Canada has acquiesced in nationwide U.S. pre-sunrise operation for so many years, "it is inconceivable that Canada would refuse to agree to maintenance of the status quo for the period of the requested stay."[7a]

[7a] Roughly half of the pre-sunrise operations conducted under former Section 73.87 are not in accordance with NARBA protection standards. This is the crucial defect of the "permissive" concept of early morning operation, to which DBA does not fully address itself.

7. *ABS petition:* ABS attacks the decision herein on a number of grounds, including matters of both law and policy. Its chief concern, although by no means the only one, is the alleged failure to afford fulltime Class II and Class III stations protection from interference from pre-sunrise operations. Its chief points may be summarized as follows. (where appropriate they are discussed in more detail below): (1) the decision represents a reversal of sound technical views and concepts expressed by the Commission in earlier considerations of extended hours for daytimers (and in testifying on proposed legislation to the same effect); (2) the decision departs from the Further Notice (1962) proposal – which represented a compromise between scientific realities and the demands of daytimers – in a number of respects and thus the balance is defeated (most important, pre-sunrise operation is permitted for daytimers without restriction as to whether there is a fulltime station in the community, and instead of a diurnal curve for determining possible radiation, the only protection to fulltime service in an inadequate limitation to 500 watts); (3) the decision represents a yielding of the Commission's traditional position as an expert agency in the face of dubious concept of "Congressional intent," which ABS asserts does not in fact exist (it is said that the real "will of Congress" is that we should use the expertise for which the Commission was created; (4) affording adequate protection to licensed service is not an insupportable administrative burden (this is what we were created for), especially since we are prepared to do it in connection with processing the new PSA requests with respect to interference to foreign stations (a disparity of treatment labelled as "arbitrary and capricious"); (5) our judgment, essentially that nontechnical factors outweigh the technical considerations which indicate greater losses than gains, is

unsupported and wrong; (6) we erroneously rejected its scientific evidence, particularly its submissions in 1966 and 1967 of the results of skywave measurements (this was three years after the record was closed herein); (7) the new agreement with Canada is not what it purports to be – a supplement to NARBA as contemplated by Section A, subsection 6 of Annex 2 to that treaty – but is a completely new agreement and thus of no effect until ratified by the Senate (ABS also expresses concern about the "secrecy" of the negotiations and the asserted "bypassing" of the Administrative Procedure Act); and (8) our legal position, that interference from pre-sunrise operations (authorized without opportunity for hearing) does not infringe licensed rights, is wrong (ABS goes further and asserts that it is an infringement even after the fulltime station's license has expired and been renewed).

8. In connection with the first point mentioned, ABS calls attention to our decisions in the late 1950's in Dockets 1274 and 12729, where we pointed out the losses in services resulting from pre-sunrise operation and stated that daytime-only stations were intended to utilize spectrum space available after accommodating fulltime stations. In connection with the third point, ABS refers to the failure of Congress to pass pre-sunrise legislation despite a number of bills introduced, and to testimony on behalf of the Commission in opposition to H.R. 4749 (in its original form) and other similar bills, opposing them in part on the ground that the Commission had the expertise to deal with such matters, which do not lend themselves to the "broad brush" of legislative handling (ABS stated that the Commission is also ignoring the statutory mandate of Section 303(f) of the Act, failing to adopt rules to prevent interference between stations).

With respect to the fifth point, ABS asserts that we attached erroneous importance to the daytimers' showings as to the value of service rendered, did not take into account the limited coverage daytimers have during these hours because of interference, overlooked ABS' showings as to the valuable wide-coverage service rendered by some of its members (said to be only examples), and in general emphasized the provision of community-limited service at the expense of service to outlying areas, with respect to weather and otherwise. As to the sixth point – rejection of its skywave measurement data – ABS calls this arbitrary and capricious, asserting that in the Skywave Measurement proceeding (Docket 10492, 10 R.R. 1562 (1954)) we rejected skywave measurements for *adjudicatory* purposes, stating that they would be considered "only in a general rule making proceeding." It is asserted that this is such a proceeding, especially since the Further Notice proposed a diurnal curve and called for comments on it, thus placing the matter in issue. If as a matter of policy we are not going to consider such measurements at all in a proceeding where they are relevant, this is said to be arbitrary, capricious and violative of Section 4 of the APA. Recognizing that the measurement showings are not "definitive," ABS asserts that it has done what it could with its limited resources and the results should be considered; that a scientific solution is feasible and should be sought rather than adopting a mechanical approach.[8]

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[8] The data advanced in 1966 and 1967 consisted of results of measurements made over three relatively short paths for a period of about four months, plus West German vertical incidence measurements made over about a seven-month period. ABS assets that these measurements not only establish the inaccuracy of the diurnal curves proposed herein, but indicate the great potential for destructive skywave interference during the pre-sunrise period.

9. The argument as to the validity of the Canadian Agreement rests upon the language of the provision of the North American Regional Broadcasting Agreement (NARBA) which is cited in the agreement as authority for its adoption, and on the background of that provision. That section (subsection 6 of Section A of Annex 2) defines "daytime operation" as being in general operation between local sunrise and local sunset at the transmitting station; however, "in particular cases" other daytime hours may be established "either in the present Agreement or in bilateral agreements, between the respective Contracting Governments, taking into account the location of the station it is intended to protect." ABS argues that this means agreements relating to *particular stations*, not whole classes of stations as dealt with here; and, also, that the "legislative history" shows that it was intended to permit agreements for restrictions on Class II stations after sunrise and before sunset ("critical hours") to protect Class I stations in other countries[9] (a subject later taken up between the U.S. and Canada in 1953, in Docket 10453). It is also asserted that during the late 1950's, when possible impact on the operating hours of daytime stations was one of the chief issues in connection with Senate

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[9] This argument is based on certain documents prepared in connection with the negotiations leading to NARBA (Montreal 1949). The U.S. proposed a definition of "daytime" and "nighttime" which specified local sunrise and local sunset, without the additional language quoted above. Canada had no proposed definition; it did propose a change in the language of the previous NARBA (1937) provision concerning Class II stations, which defined "nighttime" as "from sunset to sunrise at the location of the Class II station." Canada proposed to delete this language, giving as its reason that it would be burdensome to either the Class I or the Class II station depending on the latter's location to

(Cont'd on p. 72)

ratification of NARBA, none of the many witnesses – many of them knowledgeable in this area – ever suggested that this provision could be used to modify NARBA in the present fashion. ABS' other legal arguments will be discussed later, in the conclusions herein.

10. ABS urges that our decision and the rule adopted be set aside, and renews its proposal, advanced during the proceeding, that a government-industry committee be set up to derive, from existing or new data, a suitable set of diurnal curves for evaluating operation during the transitional pre-sunrise period. This, it is said, is the only way new daytimer pre-sunrise operations can be permitted, and such operations by fulltimers maintained, with a minimum of destructive interference. In the alternative, if the decision is permitted to stand, it asks certain specific relief for fulltime stations which will now be using their directionalized nighttime facilities during pre-sunrise hours (it anticipates that many will, rather than taking the 500-watt daytime-facility option). These specific requests are: (1) relaxation of the remote-control and first-class operator rules, discussed below; (2) permitting such directionalized operations to radiate up to 124 mv/m in their "null" directions during the pre-sunrise

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(Cont'd from p. 71)

the west or east, and to leave the definition of "nighttime operation" to the government concerned. These two proposals were considered together by a subcommittee, and one of the members from another nation suggested the idea of "critical hours" restriction on Class II stations. All three matters were summarized together in the subcommittee's report. ABS gathers from this material the view that the qualifying clause in this section of NARBA relates only to possible "critical hours" restrictions on Class II stations.

period rather than adhering to the lower values specified in their nighttime authorizations (this is the equivalent of 500 watts non-directional radiation); (3) further rule making looking toward appropriate standards and procedures by which fulltime Class II and III stations using daytime facilities pre-sunrise before January 1962 could do so again (subject to the requirement of protecting foreign and Class I stations).

11. *Petitions relating to the regional channels; unlimited-time stations.* Eleven fulltime regional stations were represented in petitions seeking reconsideration, all objecting to the restriction on full use of their daytime facilities before sunrise.[10] The only one making any specific showing was KMA, Shenandoah, Iowa, which operates with 5 kilowatts, directionalized at night, and for many years has used its non-directional daytime facilities starting at 5 AM. It objects to the requirement that it discontinue such operation.[11] It stresses the

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[10] 10 of these stations filed in two very brief petitions, simply questioning the legal effect and validity of the Canadian agreement (described as an important element in our decision) in the same manner as ABS, above, and asked that we reconsider and either "grandfather" existing pre-sunrise operations, or, at least, provide for full use of such facilities rather than imposing a 500-watt limitation not required by the agreement. We note that 9 of these are FM licensees (all but one on a wide-coverage Class B or Class C channel); the other is in a large city with multiple fulltime AM and FM services.

[11] KMA asserts the value of its early-morning service and states that it signs on at 5 AM. However, in comments in this proceeding (now incorporated by reference) it suggested a 6 AM starting time for pre-sunrise operation, and it appears from the general tenor of the present petition that its chief complaint is against restriction on nondirectional operation, rather than the matter of time.

importance of its long-standing and extensive farm programming, and also of early-morning weather information in connection with agriculture and school and school-bus schedules, road conditions, etc., a service said to be of great importance to its widespread, largely rural audience and not provided by other stations. It is asserted that, because of the four deep nulls in its nighttime pattern, directional operation during these hours will mean loss of its present service to all or parts of 9 counties (in three states), including areas quite close to its community and including 24 of the 111 school districts which rely on it for school-closing information. It is stated that operation under the "emergency" rule (Section 73.98) is not a substitute because its listeners depend on and look for its *daily* service, and their needs would not be met by "now and then" broadcasts. It is asserted that FM is no substitute either, since there is no channel available at Shenandoah in the FM Table of Assignments. KMA urges that this disruption of service, and "white areas" which will result, simply makes no sense; and that the need for early-morning service in rural areas – which we recognized in 1940 when we changed sign-on time for daytime-only stations from local sunrise to 4 AM[12] – still exists (it is asserted that in this area, unlike some parts of the country where stations have proliferated since, there are still few stations). KMA, while recognizing the enormous task confronting the Commission in this matter, asserts that nonetheless across-the-board "go-no-go" rules, of the type adopted, are simply not the answer to the differing needs of the various parts of the country (differing needs which licensees themselves are expected to ascertain and

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[12] On October 14, 1941, this rule was modified into the provisions of Section 73.87, which remained substantially unchanged until our recent decision herein.

meet) and are not consistent with the mandate of Section 307(b). It is asserted that "pioneer" stations such as KMA unfairly bear the brunt of the resolution of this proceeding, being hurt in two ways – by the drastic reduction in facilities they will be required to undergo, and by increased interference from daytimer pre-sunrise operation; and in both respects its "316 rights" are violated (its argument is elaborated in the conclusions herein). KMA asks that we "grandfather" existing 5 kw regional operations to provide continued service in rural areas. It is pointed out that we have recently applied a "grandfather" approach in CATV matters with respect to the top 100 TV markets (not proceeding toward the removal of "distant" signals received before February 15, 1966, even though off-air service in these markets is generally plentiful, almost by definition); and we should take the same approach here.

12. *Petitions by daytime-only regional stations:* Eleven formal petitions were filed on behalf of 20 regional daytime stations. Four of these stations make only the point about "6 AM local time", already discussed, and an argument concerning the language of Section 73.99(f), which describes the PSA as "secondary" and terminable without notice or hearing if circumstances require. This is discussed below. The remaining 15 stations – as well as a large number of other daytimers who have filed informal petitions for reconsideration, requests for waiver, objections, protests, etc. – oppose the reduction in operating power or hours, or both, which the new rule will require as compared to their present pre-sunrise operation, often of long standing. The arguments advanced are much the same as those detailed above. Except for two (WHUN and WXLW), the pre-sunrise operations of these stations have not been the subject of an interference complaint, and it

is asserted that such operation with full daytime facilities should be permitted to continue, at least until a complaint is received. The types of service emphasized are the same as those mentioned earlier – service to farmers and ranchers, weather information of importance to agricultural interests, schools, and the public, school-closing information, information for workers starting work at an early hour, etc. – and also matters such as Spanish language programming for Mexican workers in the area from 5 to 6 (KGNB, New Braunfels, Tex.). Several of the stations submitted letters from school officials, agricultural officials, and similar persons asserting the value of their service. WXLW, Indianapolis, calls attention to the 8,800 letters from listeners submitted earlier in the proceeding. Seven of the stations make specific mention of programming earlier than 6 AM (KXXX, Colby, Kan., as early as 4:30). Some assert that they will lose substantial revenues (the hours in question are said to be those most valued by advertisers); KXXX asserts that the 25% of its revenue which comes from "farm" accounts will be jeopardized, since such advertisers would not be interested in a station which cannot reach the wide rural audience which KXXX serves, during hours which are most important for farm listening.[13]

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[13] KXXX also makes the point that, with most of its audience located in the Central time zone although it is in the Mountain time zone, 6 AM for it means 7 AM for most of its audience in the winter months and (under "advanced" time) 8 AM in the daylight-saving portion of the year. This, it is said, represents a tremendous loss in operating hours. This station makes many of the same arguments advanced by KMA, above, including the inadequacy of weather broadcasting under the "emergency" rule (it is asserted that, with its tremendous service area, the station's staff at Cobly might not even by aware of real emergency

(Cont'd on p. 77)

13. Some claim that this loss will impair their ability to present public-service and other programming in the public interest; KGNB asserts it will probably have to give up its Spanish programming. It is urged that a licensee take each license renewal subject to the interference then existing and with the operating privileges it has had, and we are violating daytimers' licensed pre-sunrise rights in order to reduce the interference which fulltime stations took their renewals subject to. It is asserted that this restrictive action is taken with no showing as to what losses are actually caused by the interference from more extensive operation; and that we are acting too much from considerations of administrative convenience. In one case (WHUN, Huntingdon, Pa.) it is asserted that the reduction necessary under the Canadian agreement for that station, to 125 watts, is so drastic that, with the interference prevailing on the channel, the station can probably not even serve the city and it would hardly be worth while. The cost of reducing power is also mentioned. Not all of these parties have specific suggestions as to resolution of this matter except that the restrictions in the rules not apply to them; KXXX suggests (as did KMA) "grandfathering" all 5-kilowatt regional stations and KGNB suggests a general "grandfathering" or, at least, maintaining the status quo while the impact is studied and a suitable basis for continuing full-power operation is evolved.

(Cont'd from p. 76)

conditions in another part of that area, and that the station cannot afford to maintain a "weather watch"). KXXX also stresses its great coverage, presenting announcements of livestock auctions in 69 counties in four states, school closing announcements for schools in 29 counties in three states, and official weather information for school districts in 21 counties.

14. For the most part, the 20 communities in which these stations are located have no fulltime AM stations (Indianapolis and El Paso have multiple such services; there is a fulltime regional (1 kw) at Watertown, N.Y.; three other places have Class IV stations, and one is very close to a city with fulltime AM and FM service (Braddock Heights, Maryland). As to FM, 9 of the 20 stations are FM licensees or permittees, and three others are in cities where there are unoccupied assignments available for them to apply for. In three of the communities (including Braddock Heights), there is no other station and no FM channels are assigned.

15. *Other pleadings concerning the regional channels:* most of the responsive pleadings filed with respect to the petitions for reconsideration concerned Class II stations on U.S. 1-A and 1-B channels, and are discussed below under that topic. Storer Broadcasting Company, participating in the proceeding with respect to its Stations WSPD (full-time regional), Toledo, and KGBS, Los Angeles, filed a response in which it opposed DBA. Generally supporting our decision as against DBA's objections, Storer states its belief that the compromise reached leans too far away from engineering considerations in rejecting various proposals advanced by Storer, such as restricting pre-sunrise operation to 250 watts rather than 500 watts and avoiding additional interference losses by confining pre-sunrise authority to those stations which had previously engaged in it and whose listeners had come to rely on it (a position taken by Commissioner Cox in partial dissent from the decision). Storer concludes this portion of its response by asserting that, on reconsideration, we should limit the privilege to stations which have operated pre-sunrise in the past, and limit it to 250 watts.

16. A joint reply to this pleading was filed by four daytimers (three regional and one Class II) authorized since January 1962 and thus conditioned against pre-sunrise operation pending the decision in this proceeding. These stations oppose Storer's suggestion, asserting that their communities have the same needs for pre-sunrise service as those where stations have been so operating, and that it would be highly unfair to place these newer stations – which need the economic benefit during the initial stages of their operation – at such a disadvantage compared to older stations. It is also asserted that Storer's suggestion should be rejected because it is an affirmative request for revision of the decision and thus should have been filed as a petition; treated as a petition it is obviously not timely. Of the four stations, two have no other AM stations or FM assignments, although one (Hyde Park, N.Y.) is close to a larger city which does; one is in a city with a Class IV and FM station; and one is in a city with fulltime regional and FM service.

17. *Petitions and pleadings concerning Class II stations:* five Class II stations petitioned for reconsideration, as did Clear Channel Broadcasting Service (CCBS), an association of 11 Class I-A licensees. One of the five is Station WTPR, Paris, Tenn., a daytime-only station on 710 kc/s. Authorized for 250 watts power, this station is far enough away so that operating pre-sunrise it does not cause interference (using nighttime standards) to the Class I-B station to the west (at Seattle), and therefore it has been signing on under Section 73.87 at sunrise New York City or shortly thereafter. Its very brief petition simply raises the same arguments questioning the validity of the Canadian agreement mentioned above for certain fulltime stations, and asks that its present pre-sunrise hours of operation be "grandfathered", and permitted to begin at sunrise

New York City even when that is earlier than 6 AM local time (it does not specify what its actual hours have been). WTPR is the only AM station in Paris; it is a Class A FM licensee.

18. Two petitions by limited-time Class II stations on U.S. I-A channels (located west of the co-channel I-A's), as well as Storer's responsive pleading insofar as it relates to KGBS, raise the question of the time limitation, 6 AM, applied, to these channels. The Canadian agreement specifies "6:00 A.M., local standard time" as the earliest starting time for Class II, as well as Class III, pre-sunrise operation, without any exception for U.S. I-A channels. However, as these parties point out, there are no Canadian stations on these U.S. I-A channels (660, 750 and 1020 kc/s), or, indeed, on any U.S. I-A channels. KOWH, Omaha (660 kc/s) seeks a sign-on time of 6 AM *local time* (which it now uses), and raises the point already dealt with in this connection. It also urges that, if necessary, stations in its situation should be notified internationally as "specified hours" operations, starting at sunrise at the Class I station or, at least, at 6 AM local "advanced" time when that is later than sunrise at the dominant station.[14] KMMJ, Grand Island (750 kc/s) which emphasizes farm programming and signs on at 5:15 AM when sunrise at Atlanta permits it to do so, makes much the same arguments as KMA, including those concerning the validity of the Canadian agreement and its rights under its license previously mentioned under KMA. It also asserts that the adoption of this restriction is illegal because the Further Notice herein, of November 1962, proposed to permit full use of daytime facilities by Class II's on U.S. I-A's, located west of the dominant station, without any restriction as to time;

14 The request is in the alternative, for reconsideration or waiver.

therefore, relying on this, it did not comment in the proceeding. It is also asserted that with KMMJ directionalized to the west so as to protect the Atlanta I-A station, and over 900 miles away, it in all probability does not cause any interference to that station after sunrise at Atlanta. It emphasizes its extensive and assertedly unique farm programming, and claims that hours before 6 are highly important to give the farmer needed information before he starts work. It is asserted that the other Grand Island fulltime station (a Class IV) is so limited in coverage at night that it scarcely covers the city and cannot begin to reach KMMJ's wide rural audience, and it is said that FM service in the area is almost non-existent, with few receivers, so that people could simply not get the same service and economic considerations preclude KMMJ's attempting to build an FM market. It is urged that the decision be set aside or at least modified to give "grandfather rights" to class II stations west of co-channel U.S. I-A stations.

19. Storer's pleading on behalf of KGBS makes some of the same points concerning the absence of Canadian stations on these channels and lack of Canadian interest in any restriction on U.S. Class II stations on them. Storer also alleges what it considers the special status of "limited time" stations such as KGBS (KMMJ is so licensed also). It is asserted that the Canadian agreement's reference to use of "daytime facilities" only after 6 AM obviously refers to either daytime-only stations or fulltime stations authorized different facilities day and night, and not to "limited time" stations, which (under Section 73.23(b) of the Rules) are authorized to operate not only daytime but during nighttime hours not used by the dominant station (where located east of the I-A station they may operate until sunset at the dominant station's location). Calling attention to our

observation in the Notice of Proposed Rule Making in Docket 17562 (power limitation on Class II pre-sunrise operation) that conditions on U.S. I-A channels are somewhat different from those on other frequencies, Storer states that this should apply to time as well as power, and asks us to declare that the 6 AM limit does not apply to these channels and adopt the rule proposed in the 1962 Further Notice herein.

20. The other two Class II petitions are from Class II stations located east of the dominant co-channel I-A stations and are precluded under the new rule from any operation before local sunrise – WHCU, Ithaca, N.Y., and WHLO, Akron, Ohio (both also have waiver requests pending). These stations have been engaging in pre-sunrise operation starting at 6 AM or shortly thereafter, for some years, WHCU on the basis of an agreement with the co-channel I-A station (WWL, New Orleans)[15] and WHLO on the basis that, so operating, it does not cause interference within the 0.5 mv/m 50% skywave contour of the co-channel I-A station, KFI, Los Angeles, and therefore under its interpretation of former Section 73.87 such operation was permitted.

21. WHCU asserts that our action adopting a rule precluding pre-sunrise operation by stations in its situation is essentially illegal, because the matter did not receive much specific attention in the 1962 Further Notice (the text of the rule concerning Class II's was set forth in a footnote), it was not covered in the record in this proceeding, and our decision contained only brief references to the problem of protecting the skywave

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[15] The first agreement was entered into in 1956. It has not been renewed for some years; therefore it is probably more accurate to say that the operation takes place in the absence of objection by WWL which has knowledge thereof.

service of Class I-A stations.[16] Noting the fluctuating nature of skywave service with respect to time of year, and the small portion of total nighttime hours which are involved here, WHCU asserts that no order terminating existing pre-sunrise service on the basis of interference to I-A skywave service can be adopted before certain questions are answered, as to whether the Class I-A's skywave service during this period merely duplicates what it has presented during earlier hours, the extent to which it is actually relied on (in view of its seasonally varying character) and is intended specifically for distant audiences who would lose its service through interference, whether destructive interference is actually caused, and the need for the pre-sunrise operation in question. It is also asserted that our treatment of stations in this category differs arbitrarily from that of Class II stations to the west of co-channel dominant stations, since we are allowing operations by the latter even though recognizing that it may cause some skywave interference to the dominant station to the east (Report and Order, Appendix A, Footnote 9). Making the same argument mentioned above under ABS and others concerning the need for flexibility in administrative-agency determinations, WHCU asserts that, perhaps unlike the regional channels where a broad approach is required by the number of stations and situations involved, here there are only a few stations to be considered, and *ad hoc* evaluation is necessary before existing pre-sunrise operations are terminated. WHCU in this petition and its waiver request asserts the value of its pre-sunrise service (farm information, weather, etc., with special emphasis on the latter because Ithaca is in a "snow belt"), and submits some 30 letters from farm officials, school authorities, and others (*e.g.*, Red Cross officials concerning emergency blood

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16 Report and Order, Footnote 8a; Appendix A thereto, Footnote 16.

requests). It asks that we amend the rules to make Class II stations located east of co-channels U.S. I-A stations eligible for PSA's where they so operated before July 1967. We note that WHCU is a Class B FM licensee.

22. WHLO, Akron, bases its argument chiefly on the fact that a 500-watt pre-sunrise operation would not cause interference within the skywave service area of KFI, Los Angeles; therefore, it is asserted, it was permissible under former Section 73.87 and should be permitted to continue without disruption. It asserts that *ad hoc* consideration must be given to situations such as that of WHLO before existing operations are terminated. It is asserted that it has no impact on the service of KFI (which apparently did not know it existed) and that, even if termination would add to that station's service area it would merely be a new service, for which no need has been shown, at the expense of an existing and relied-on service.[17] WHLO's petition and its waiver request emphasize its position as the only Akron AM station not permitted fulltime operation but having a wider pre-sunrise service area than the others (it claims coverage of 18 counties in northeastern Ohio). WHLO is not an FM licensee; there are multiple fulltime AM and FM services in Akron and close-by communities.[18]

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[17] The sign-on hours would, of course, have to be keyed to sunrise at Class I-B Station CBN, St. John's, Newfoundland, under new Section 73.99 and the Canadian Agreement.

[18] WHLO also asserts that KFI's service area is already limited by a Cuban co-channel station to a point closer to Los Angeles than WHLO's pre-sunrise operation limits it; and that the absence of objection by KFI up to now to its operation cannot be explained by the 6:00 AM operation of WOI, Ames, Iowa, under Special Service Authority, since WHLO's operation occurs earlier (the WOI operation is the subject of a hearing concerning its continuation).

23. *Filings on behalf of Class I-A stations:* CCBS sought reconsideration on behalf of its 11 I-A licensee members, agreeing with our decision to terminate pre-sunrise operation by Class II stations on these channels to the east of the dominant station (noting its showings in earlier proceedings as to the losses from such operations to the wide-area service of Class I stations), and urging that the same principle be applied to those to the west, or, at least, that they be limited to 500 watts (or daytime power if less), a matter at issue in Docket 17562. It was also urged that such operation be only on the basis of a PSA duly sought and issued (none are required under the Note to Section 73.99(b)(1)). CBS, in a supporting statement, asserts that the Class I-A stations must be relied on to cover the new "zones of interference" which we recognized migh occur as a result of our decision, and called attention to its complaint against Class II's operating after sunrise New York (but before their own local sunrise), which we recognized in the decision (Appendix A, footnote 9), as a potential source of interference to WCBS. CBS also objects to termination of what it believes to be the right of Class I-A stations to protection from undue interference under former Section 73.87(b), asserting that this was never contemplated in the proceeding and therefore adoption thereof is a violation of the Administrative Procedure Act.

24. CCBS also filed an opposition to the four petitions by Class II stations on I-A clear channels, described above.[19] As to KMMJ and its claim of public injury through the preclusion of early-morning farm

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[19] KFI filed an opposition to the WHLO petition substantially similar to that of CCBS, stating it will oppose a waiver request by that station.

service, CCBS (one of whose members is WSB, the dominant station on that channel at Atlanta) asserts that this is a balance between local service and interference which our decision considered and reached; that KMMJ has not shown how many farmers actually rely on its service earlier than the hours of sign-on permitted by the new rules; and that, while many Class II stations do not maintain farm departments, all of its I-A members maintain extensive farm operations and specialize in programming for small-town and rural America; that any extension of Class II operating hours beyond those permitted by the new rules would destroy the vital skywave and groundwave services of Class I stations; and, indeed, the best solution to providing farm and weather service to rural America would be to eliminate all pre-sunrise operation by Class II stations on U.S. Class I-A channels. With respect to WHCU's argument based on lack of objection by the dominant station, CCBS urges that it is not in the public interest – and, indeed, may well be an impermissible delegation of the Commission's duties under Sections 303(c) and (f) – to have rules which permit licensees to agree on operation which causes destructive interference contrary to the public interest. With respect to the "6 AM local time" argument, CCBS urges that since standard (non-advanced) time is in accord with the pertinent physical facts relative to interference, it should prevail as the rule now provides. As to WHLO, CCBS urges that we should adhere to "a sound, long-standing Commission policy" prohibiting pre-sunrise operation by easterly Class II's on I-A channels, and that this single situation should be considered on a waiver basis if at all. It is asserted that permitting pre-sunrise operation by eastern Class II's will cause a large part of the country to lose all AM service because of interference; it is asserted that, since 6 AM Akron is 3 AM Los Angeles, this is nighttime, not

transitional, operation in wintertime, and would result in an "intolerable" loss of skywave service and illegal modification of KFI's license from Class I-A to Class I-B status. Referring to our earlier statements stressing the importance of clear channel service and of allowing it to be received wherever it can be, free of interference, CCBS asserts that neither KFI nor the I-A station at Salt Lake City should be "duplicated" in any fashion, since they are the only I-A stations in the West, where the bulk of the "white area" is, and provide early morning skywave service beyond their 0.5 mv/m 50-% skywave contours. The fact that WHLO has been engaging in such operation "in violation of the Commission's Rules" is no reason to continue to deprive listeners in the "white area" of this skywave service.

25. Storer in its pleading labelled CCBS' suggested prohibition of pre-sunrise operation by western Class II's as without foundation, since such operation has historically taken place. KOWH and WHLO replied to CCBS' opposition to their petitions, the former merely repeated the allegations in its petition concerning the desirability and significance of 6 AM "local time" sign-on and asserting that CCBS has not refuted them. WHLO asserts that the "interference" caused to KFI by its pre-sunrise operation is of little significance, considerably less than that permitted on the decision for stations on regional channels, since it is not within KFI's "secondary service area", and the listeners affected, if any, would be affected in the dead of night (3 AM Pacific time and after).

Conclusions

26. *The regional channels:* after careful consideration of the pleadings discussed above, it is our view that with respect to the regional channels, our

decision herein of June 28, 1967, and new Section 73.99 of the Rules adopted therein, should be affirmed without change, with the understanding that an effort will be made to redefine the 6:00 AM sign-on in terms of prevailing local time. In reaching this determination, it is appropriate to make some observations concerning this proceeding and the nature of the decision reached before.

27. Former Section 73.87, the long-standing "permissive" rule, was adopted in October 1941, when there were a relative handful of AM stations compared to the present number – 882 altogether compared to some 4,250 today, and, in particular, 60 daytime-only stations compared to some 2,180 today, 1,214 of them on regional channels. The rule worked reasonably well for a number of years, permitting pre-sunrise use of daytime facilities without generating a substantial number of interference complaints. It appears that the vast majority of regional daytimers, and many fulltimers, took advantage of the rule. However, by the late 1950's, this had ceased to be true. The number of complaints was markedly increasing (in part, at least, because of the increased number of stations), and, under the procedure then used, these generally led to automatic, and summary, termination of the operation complained of, to the annoyance of the station and often of its public who had come to rely on it.[20] The uncertain status of operation under Section 73.87 was underlined in 1961 by the decision of the U.S. Court of Appeals for the District of Columbia in *WBEN, Inc. v. FCC,* 290 F.2d 743, which held, in effect, that unless we were prepared to condition a grant of improved daytime facilities

20 As we pointed out in the decision, by 1967 there had been complaints filed by and against stations on 25 regional channels, compared to only 15 three years before.

against use thereof before local sunrise, an unlimited-time licensee able to show that such use would cause it interference under our regular nighttime standards had standing to object to the grant and a right to a hearing on the question of interference.

28. There were also international considerations. The language of the 1937 NARBA was somewhat ambiguous, but its successor, the 1950 NARBA, contained the very precise language, in paragraphs (a) and (b) of subsection 6 of Section A of Annex 2, that "Daytime in general means operation between the times of local sunrise and local sunset at the transmitter location of the station" (Subject to possible supplemental agreements discussed below) and "'Nighttime is operation at any other time". The agreement also provided, of course, for notification procedure. Therefore, when this treaty entered into force in 1960 (after ratification by the U.S. Senate), this country was faced with the necessity, in compliance with its international undertakings, of bringing pre-sunrise operation – which is operation during nighttime hours – into conformity with the new agreement, including notification. As ABS showed in its comments in the proceeding, observance of NARBA requirements with respect to Canada would have required a large number of existing pre-sunrise operations to be terminated or, if lesser powers could be used, sharply curtailed in power.

29. Both of these developments made it considerably less than certain that, just because a particular pre-sunrise operation had been conducted without complaint in the past, it would continue to take place without complaint or international problems. Also, in 1961, Storer Broadcasting Company (licensee of WSPD, Toledo, on behalf of which it had filed a number

of pre-sunrise complaints) filed a petition asking for certain changes in the procedures followed under Section 73.87, some of which were proposed in the original Notice herein in December 1961. A number of daytimers opposed the petition and the Notice proposals because it was believed they would make easier the filing and perfecting of pre-sunrise complaints by daytime-only stations, which, indeed, did appear to be one of the purposes of the petition.

30. With all of the domestic and international uncertainties and anomalies that had developed by 1962, it appeared highly desirable, if not imperative, that whatever pre-sunrise operation was to be allowed in the future should be on a more orderly basis. Also, there were developments of a more substantive nature. The increase in pre-sunrise complaints appeared to indicate a feeling that general pre-sunrise interference conditions on the channels were becoming worse, just as we observed them to be in the nighttime AM service generally.[21] In July 1962, the House of Representatives passed H.R. 4749, which appeared to indicate that body's belief that the rather strict nighttime engineering standards which had been used in evaluating pre-sunrise service and interference, both in general "extended hours" rule-making proceedings in the late 1950's and in passing on pre-sunrise complaints, should be applied somewhat less rigidly and automatically (see Footnote 6, above). In light of these developments, we re-studied the situation during that year, and in November 1962 issued the proposal contained in the Further Notice herein, which appeared to us to represent a suitable balance between two conflicting considerations—on the one hand, the fact that daytimers often render valuable locally oriented

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21 In May 1962, we imposed a "freeze" on the acceptance and grant of most AM applications.

service during these hours, with respect to news, weather, etc., and, on the other hand, the fact that such operation, taking place during non-daytime hours, does cause substantial interference. The solution finally adopted differs somewhat from that proposal, in light of the record, but it still nonetheless represents – as it must – a compromise.

31. As noted, almost the sole ground of complaint of the regional channel petitions (other than ABS) is the restriction on their operation compared to what they have used up to now, with respect to power (they have been using full daytime facilities, and most are authorized more than 500 watts) or time (some have been operating earlier than 6 AM local time) or both. With two exceptions, the stations have been operating without interference complaints, and the question is asked as to why such curtailment, and disruption of relied-on service, should therefore be required. The answer lies in the necessity for reaching a balanced compromise of conflicting interests within the framework of this country's international obligations concerning the notification to foreign countries of standard broadcast operations, and proscribing such operations when they cause objectionable interference to foreign co-channel stations. Both in the Further Notice proposal and in the decision adopted, we set forth an arrangement which would preclude fulltime regional stations from the right which they had hitherto had, of filing interference complaints where they believed the matter serious enough to warrant the effort (which included reversion to their own nighttime facilities). This had been one means of affording a measure of protection to licensed unlimited-time services. With its removal, some other method of providing a degree of protection was required. This was achieved by limiting all pre-sunrise use of

daytime modes of operation to 500 watts, or lesser power if necessary to afford foreign protection.[22]

32. This reduction may result in some loss of existing pre-sunrise service (particularly, perhaps, in the case of 5-kilowatt operations now restricted to 500 watts) but it is necessary if the compromise and balance are to be maintained. We also point out that the general power cut-back means a reduction in interference; and, as we observed in Appendix A to the Report and Order (paragraph 26), interference conditions on many channels may well be improved, so that a given amount of power will produce usable service over an area as great or greater than that served now with a higher power. The same general considerations apply in the case of KMA, Shenandoah, Iowa, which seeks to use full daytime facilities instead of nighttime directional facilities. It may be that there will be some loss in service presently provided, to those areas which are in the "nulls" of the nighttime pattern; but overall service may well be improved. If KMA wishes to concentrate on the "null" areas, it has an option of using 500 watts nondirectionally.[23] We also point out that, while the

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22 Two of the petitioning daytimers complain specifically of the low power they will be required to use to meet the requirements of the Canadian agreement with respect to co-channel Canadian stations. Such complaints cannot of course be considered. We point out in this connection that the provisions of the agreement, and Figure 12 adopted in the new rules, are substantially *less restrictive* than NARBA; if these stations were required to conform to NARBA requirements they would be limited to even lower power if permitted to operate at all.

23 Station KFNF, fulltime, is licensed to provide nondirectional 500-watt service at night at Shenandoah.

over-all power restriction is not required by the Canadian agreement, many regional stations would be limited to power of this level, or only slightly more, by the requirement of protecting Canadian and other foreign stations, which we are not in a position to waive.

33. We cannot accept the contention of DBA that – in order to "grandfather" existing operations, particularly daytimers, – we should treat engineering standards of protection to licensed service any more lightly than we have in the decision. To do so would be to take too lightly the apprehension expressed by ABS – that local pre-sunrise service by daytimers is being accommodated at the expense of wide-area coverage by fulltime regional stations to rural areas which have no stations at all. DBA alleges inconsistency in our deciding that interference on the regional channels is "of no concern" and then imposing a 500-watt limit on existing operations. Inteference is not "of no concern"; it is simply that, in our judgment, a limitation to 500 watts is a reasonable, and easily administered interference control device. Possible consideration of greater power, on a waiver basis, is discussed below.[24]

34. With respect to operation before 6 AM, as mentioned, some of the contentions on the subject concern only changing the rule from 6 AM standard time

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[24] In this connection, it should be observed that the difference in service area between 500 watts, and a higher power, is not necessarily as great as might appear. One informal waiver request stated that the reduction from 1 kw to 500 watts would cut the station's service radius in half. This is not the case. In one formal waiver request, supported by engineering (KLIK, Jefferson City, Mo.) it is shown that with 500 watts the interference-free pre-sunrise contour would extend about 10 miles from the transmitter, compared to about 16 miles with 2.18 kw and 20 miles with 5 kw.

to 6 AM "local" time (*i.e.*, advanced time). As mentioned above and in the Notice of Proposed Rule Making adopted herein, we are presently of the view that, at least for the regional channels, this is appropriate, and propose to amend the rule in this respect if it can be accomplished internationally. As to operation earlier than that, such operation is precluded by the Canadian agreement unless, of course, the operation would be free from foreign interference considerations so as to be capable of being considered on a regular application and notification basis (it is believed that few are thus susceptible). This is discussed below in connection with possible waivers. Moreover, this was also a term of the Further Notice proposal, and is one we would likely adopt for domestic purposes also, even in the absence of foreign considerations. As we mentioned in the decision (Appendix A to Report and Order, par. 27), we are not persuaded that, in general, earlier operation has enough public interest to warrant the extensive interference entailed during the pre-6:00 AM period, when interference conditions more closely approach, or equal, full nighttime conditions.[25] Like the matter of power, this is part of the balance and compromise which must be reached.

35. One thing we note in connection with our decision, although not necessarily a determining factor in it, is the general availability of the FM service. As pointed out above, of all daytime regional stations filing formal petitions, almost half are FM licensees or permittees, in most of the communities there is FM service, and in all but three there are FM channels

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[25] As mentioned in Footnote 11, above, KMA, which is one of the stations stressing its farm programming, signs on at 5 AM; but in its earlier comments in this proceeding it appeared satisfied with a 6 AM sign-on.

assigned (one of these probably could get an assignment; two could not).[26] An FM assignment could be found for Shenandoah, Iowa, and, as mentioned, all but one of the other petitioning fulltime regional stations are FM licensees or permittees (the one is in a city with multiple FM services). The same is true, although perhaps to a lesser extent, of stations filing informal petitions or formal or informal waiver requests, objections, etc. We will shortly institute rule-making looking toward making assignments available in their communities, if none is there now, and it appears that an assignment is warranted. In this connection, two plains-area stations (KXXX, Colby, and Class II station KMMJ, Grand Island) assert that this simply is not the answer in their areas, where there is little or no FM service and therefore very few receivers. We note, however, that at Colby another party recently foresaw enough interest to petition for assignment of a wide-coverage Class C channel there (which was done), and another Class II station in Nebraska (WJAG, Norfolk, a town smaller than Grand Island) is an FM permittee. But, whether or not FM is available or viable in a particular case, we believe the limitations previously adopted, and affirmed herein, must be applied if the balance struck – which appears to be the best available – is to be maintained.

36. As indicated above, in general the parties commenting concerning the regional channels seek "grandfathering" of existing operations – their own, their general class of station, or all existing pre-sunrise

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[26] Caruthersville, Mo. can receive an assignment; the two communities which cannot are Braddock Heights, Md. and New Braunfels, Tex. The former is almost adjacent to Frederick, Md., as noted above; the latter is about 30 miles from San Antonio, and thus within the service range of clear channel Station WOAI and numerous San Antonio FM stations.

operations. DBA requests (if we do not adopt its sweeping suggestion for resolution of the proceeding) that we undertake an elaborate survey, by questionnaire, into programming and other matters concerning all stations involved in this proceeding, meanwhile staying the rules for six months except permitting stations not hitherto authorized pre-sunrise operation (or terminated on complaint) to operate under the new rules. ABS asks that the decision and rules be set aside pending study of transition-period propagation conditions, and development of a suitable diurnal curve, by an industry-government effort.

37. For reasons set forth above, we do not consider "grandfathering", as such, a possible solution, because it is not consistent with the balance arrived at herein, which we believe to be an appropriate one. Also, to the extent it would permit the continuance of operations causing objectionable interference to foreign stations (which many would), it would be inconsistent with this country's international obligations. Moreover, "grandfathering" would almost necessarily involve withholding of pre-sunrise privileges from new stations, a course we considered in the decision and decided not to adopt (Appendix A to Report and Order, par. 25). As to suggestions that, essentially, we withhold the decision herein pending studies of various types, this too cannot be considered seriously. For one thing, continuation of operations which do not comply with treaty obligations is precluded by the manifest need for international reciprocity in frequency management. DBA's suggestion (par. 6) that Canada would, or should be asked to, agree to maintenance of the status quo pending the six month's study requested, is hardly appropriate for consideration at this juncture. Moreover, in connection with this request, it seems hardly likely that the survey requested by DBA – involving thousands of stations and

a vast and somewhat amorphous amount of information – could be completed in 6 months, or indeed satisfactorily at any time in the near future. Our experience with other questionnaire surveys, involving fewer respondents and narrower and more specific points, is to the contrary. ABS' suggested study also is not one which could be completed in a short time, nor is it likely that the data yielded would be more than cumulative. While we will consider specific proposals for the gathering of meaningful information in either of these areas, and indeed welcome them, they cannot be the basis for not deciding this proceeding now.

38. Conceivably, international considerations aside (*i.e.*, with respect to operations conforming or made to conform to all pertinent international requirements) we could consider one of two alternatives to the decision reached. The first of these is a complete return to the 73.87 *status quo*, with the rough, though not happy, balance reached thereunder. This would necessarily mean honoring interference complaints, including more than 60 filed and not acted on prior to our decision, on a summary basis; otherwise, in our view, there would not really be a balance and fulltimer service would be subject to undue interference overall. It might well mean that all, or most, applications for new or increased facility daytime-only stations would have to be the subject of hearings, under the WBEN case, *supra* since virtually all regional daytimer pre-sunrise operations cause objectionable interference, under our nighttime interference rules, to one, or usually more, fulltime stations. This "permissive" system has proved considerably less than satisfactory during the last years of its existence, and we see no reason to return to it (interference complaints, of course, might well be even more numerous because, for international reasons, the Commission would have to have information,

not easily available at present, as to the exact extent of the pre-sunrise operations of various stations).

39. Alternatively, the other possible course would be to proceed on what might be called a modified "grandfather" basis, such as, perhaps, reducing power on a proportionate basis (5 kw operations to 2.5 kw, etc.), or using 1 kw instead of 500 watts as the ceiling. However, this has not been suggested by any party on reconsideration, and we believe it would necessarily involve withholding pre-sunrise rights from stations which have not so operated before, if the balance is to be even roughly approximated. This we have rejected before and do again (see Appendix A to Report and Order, par. 25).[27]

40. ABS and DBA present a number of related, but opposite, arguments against various aspects of our decision. DBA asserts that we failed to carry out the philosophy of H.R. 4749 to a logical conclusion in the public interest; ABS asserts, on the other hand, that there is no "will of Congress" in this area, except that we use our expertise, and that we mistakenly thought there was and abandoned our expert judgment in favor of a "broad brush" approach. The answer to both is that one House of Congress, in 1962, passed a bill, and in connection with deliberations leading to it we expressed our willingness to re-study the matter. The result of that re-study was a tentative view that daytimer pre-sunrise

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[27] As the four stations filing in opposition to Storer point out (par. 17) communities with new stations have the same needs as those with older stations. We likewise agree that the withholding of pre-sunrise privileges from new stations was not properly raised by Storer (the only party mentioning it) in a timely petition for reconsideration; and, in any event, it was raised only in connection with restricting pre-sunrise operation, not as a means of permitting greater pre-sunrise operation by older stations.

operation rendered a more significant service, placed in comparison to the losses it causes, than strict evaluation by traditional nighttime engineering standards would indicate, a view much the same as that of the House at that time.[28] As the ensuing proceeding developed, this view appeared to be justified, and was adopted in the decision, which, as mentioned, struck what we believed, and still believe, to be an appropriate balance. ABS asserts that we wrongly did not adhere to sound engineering principles; DBA apparently would have us dispense with them entirely as far as protection of fulltime regional service is concerned. Again, we have struck what we believe to be the most appropriate balance between these positions, in light of our re-study and the ensuing record made in this proceeding. ABS also criticizes our action as departing from the Further Notice proposal (which itself represented a balance), in permitting pre-sunrise operation by all daytimers rather than just those in communities without a fulltime station, and employing only a flat 500-watt limit (said to be inadequate) as a protection from interference. The reasons for this were discussed in the Report and Order (par. 19) and Appendix A thereto (par. 24 and 40) and do not need repetition here; we believe the balance arrived at is a sound one. ABS also asserts that we attached too much weight to the "non-technical" aspects of daytimer service showings and too little to those of fulltimers (mostly its members), while DBA insists that we acted with too little information as to the value of existing pre-sunrise service by daytimers. We had the benefit of submissions by numerous stations on both

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[28] Clearly, the re-study of 1962 was prompted in part by Congressional sentiment on the subject. However, the result, as set forth in the Further Notice and later in the decision made in the light of the second, reflects our best judgment of the matter.

sides, and gave it appropriate weight. As noted in the decision (Appendix A, pars. 1, 6, 11, 16, 17), the daytimers made somewhat more persuasive showings as to the extent to which listeners rely on their service.

41. ABS also attacks our exclusion of its late-submitted skywave measurement data. Our rejection of this material was because – being limited in nature (see footnote 8, above) – it did not materially help as a tool in the resolution of this proceeding. We did not say in the decision, and certainly do not say now, that skywave measurements will never be considered in rule-making; but these, limited as they were, did not appear either to serve as a useful tool for evaluating transition-period conditions or to afford reason to postpone decision of this long-standing and important proceeding any longer.[29] As we stated (Appendix A to Report and Order, footnote 17), the protections against interference adopted appear adequate and reasonably simple, and, also of some importance, they afford the basis for a decision now.

42. We are also criticized – both by ABS and by parties stressing maintenance of their present operations – of adopting a too general and sweeping treatment (after having said Congress should not do so in this area), without proper regard for the need of maintaining existing service, or of avoiding undue interference, in particular situations, in the interest of "administrative convenience." These contentions are without merit. We pointed out in the decision (Appendix A to Report and Order, par. 30) that case-by-case consideration in this area would involve unbelievably staggering burdens, and

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[29] For a discussion of the Commission's position on the subject of skywave measurements, see the decision in the *Skywave Measurement* proceeding, Docket 10492, 10 R.R. 1562 (1964).

create cases of extreme complexity. This is true because skywave interference – which is involved here – is of a long-distance character; a single station may affect, or be affected by, many stations in various directions. This discussion in the paragraph cited covers the point. With respect to ABS' contention that this is in arbitrarily sharp contrast with our individual analysis of foreign interference problems in connection with PSA requests, the two subjects are not of the same magnitude at all. A fairly high percentage of PSA requests can be evaluated almost automatically, in view of the great distances of most U.S. stations from foreign stations, a situation which would seldom prevail in domestic situations on the crowded regional channels. Also, there are usually only two or three foreign stations in each country on each channel to be considered, and there is a fixed standard (Figure 12 for Canada; the U.S./Mexican Agreement for Mexico), against which each proposal is evaluated. Domestic analysis would be completely different, and, no doubt, would have to take in the "non-technical" factors mentioned. Even so, the staff is currently spending more time on the PSA review than could be devoted on a continuing basis. As to ABS' contention that we have ignored the mandate of Section 303(g) of the Act, directing us to make rules to prevent interference between stations, such a rule has been adopted; by virtue of the time and power limitations imposed on pre-sunrise operation.

43. *The Canadian agreement.* As mentioned, ABS and a number of other parties attack, or at least question, the validity of the Canadian agreement referred to and incorporated in our decision and the new rules. It is asserted that it was negotiated in secrecy, without the opportunity for public analysis and participation (in contrast, for example, to the "Canadian Daytime

Skywave" proceeding of 1953, Docket 10453); that it is a by-passing of the Administrative Procedure Act's rule-making provisions; and that it is not yet valid because – not in fact being (although purporting to be) a supplemental agreement to NARBA – it is not in effect until ratified by the Senate.

44. The first two contentions merit little discussion. As to the APA argument, that Act specifically exempts matters which are "a military or foreign affairs function" from its rule-making provisions. This is clearly a "foreign affairs function." As to the conduct of the negotiations, the manner of conducting these is a matter for the pertinent agencies of the governments involved. In some cases, public participation may be in the general interest of all concerned; in others, not, and in this case the latter appeared to be true.

45. As to the status of the agreement, despite the argument (set forth earlier) that it is not a "bilateral agreement between the respective Contracting Governments", as contemplated by subsection 6, Section A, Annex 2 of NARBA, we believe that it is. This view has been and is shared by the Department of State (which was involved in the negotiations) and by the counterpart Canadian agencies. In our view, the language "particular cases" mentioned by ABS and above (together with the later language concerning "taking into account the location of the station it is intended to protect") does not limit that subsection's meaning to agreements involving only one or a few stations, but permits agreements covering classes of stations such as the one here. The "legislative history" cited by ABS may indicate, though certainly not conclusively, that the intent of the NARBA conferees was to provide for further understandings concerning skywave protection during "critical hours" to Class I stations in the other

country; but there is no reason why, later, if the governments involved agree to something else which is within the scope of the language, such agreement does not fall within the pertinent language. We hold the Canadian agreement to be a valid "bilateral agreement" within the meaning of the section cited, and therefore valid when executed by an exchange of notes, without Senate ratification.

46. However, a decision on this point is not necessary to the present consideration. We point out, first, that the agreement and associated standards (Figure 12 of the Rules) are substantially less restrictive than the nighttime standards of NARBA which would otherwise apply; if the latter were applicable instead, it might be necessary to impose further cutback, or termination, on a large number of pre-sunrise operations, both daytime and fulltime. The general reduction to 500 watts is, of course, not a term of the agreement; this rests on our own consideration of domestic interference conditions and means of dealing with them. As far as the 6 AM restriction is concerned, we will endeavor to get the agreement clarified or modified to specify 6 AM "local time"; as far as operation before 6 AM is concerned, this restriction was a proposal in the Further Notice, set forth and later adopted for domestic reasons already discussed, and would probably be considered appropriate for adoption irrespective of the agreement. The agreement followed efforts on our part, which began in 1964 and developed with reasonable satisfaction, to obtain the necessary approval for a "pre-sunrise" arrangement along lines which seemed to us (after considering the record in Docket 14419) to be most in the public interest.

47. *Legal considerations.* The legal arguments raised by various parties are, essentially, the same as

those advanced earlier and considered in the decision (Report and Order, pars. 20, 22; Appendix A, pars. 32-33). It is urged by ABS and KMA that the condoning of additional interference without hearing violates Section 316 rights, and, also, by KMA and other parties wishing to retain their existing pre-sunrise operations with full facilities, that their licenses are being modified in violation of that Section if this operation is curtailed. ABS takes the position that permitting additional interference entails reduction in a station's service area and therefore, in effect, its power, a reduction which cannot be accomplished without going through proper hearing procedures. It regards the situation as quite different from those in *American Airlines v. CAB*, 359 F.2d 624 (1966) and *California Citizens Band Association, Inc. v. U.S.*, 375 F.2d 43 (1967), which are thus said not to be applicable. It is also said that the *American Airlines* principle, carried to its logical extreme, would permit the Commission, by general rule-making, to wipe out a station's entire service area, which demonstrates the principle's inapplicability here. Other parties assert that pre-sunrise operation is a term of the license and cannot be taken away without hearing, at least in the absence of complaint; it is asserted that the existence of interference sufficient to warrant termination of it is an "adjudicative fact", requiring determination in a hearing, and the necessity of establishing this fact is not met by our statement that "virtually" all pre-sunrise operations cause such interference when evaluated by conventional nighttime standards. Some of these parties would also distinguish *American Airlines* as prospective in nature and therefore inapplicable here.

48. As we observed in the decision, this agency cannot conclusively determine the extent of its

regulatory authority with respect to its licensees; this is for the courts. We adhere to the view that the *American Airlines* case, *supra*, establishes our authority to take the action taken herein, on the basis of a general rule-making proceeding and without individual adjudicatory proceedings. Certainly there was nothing any more "prospective" in that decision than is the case here; it involved imposition of a new condition (in effect, a prohibition against competing for business of a certain character with carriers of a different class) upon airlines whose certificates were of long standing. ABS' assertions that by this means we could wipe out a station's service entirely, and are in effect reducing its power, are inapposite; the action taken herein does not have that effect when viewed in the light of the existing full-facility "pre-sunrise" operations. As to the contention concerning a licensed right to such pre-sunrise operation, we likewise adhere to our earlier view that this is not, and never has been, a licensed right, even in the absence of a specific complaint. *Music Broadcasting Co. v. FCC*, 217 F.2d 339 (1954). As discussed below, we are willing to consider PSA proposals in excess of 500 watts which, in addition to meeting foreign protection requirements, provide conventional *domestic* nighttime protection.

Class II Stations

49. As mentioned above (pars. 18-19), two Class II stations on U.S. I-A channels, to the west of the dominant stations, raise the question of the 6 AM starting time. One seeks only 6 AM "local time" – a matter we will take up with Canada and which is discussed in a Notice of Proposed Rule Making adopted today – and the other seeks operation earlier than 6 AM, contending (*inter alia*) that our action in this respect was improper because this restriction was not contained in

the Notice. With respect to these two stations, this matter need not now be decided, because sunrise at the dominant station to the east is now too late to permit operation earlier than 6 AM at the western location, and will be at least until the end of February. We will discuss with Canadian authorities the question of the applicability of the Canadian agreement to the U.S. I-A channels, Canada having no stations thereon, and some modification in this respect may be in order even beyond the 6 AM "local time" adjustment.

50. Storer's similar request, on behalf of Station KGBS, Los Angeles (made in a responsive pleading rather than in a petition) is in a different posture, because sunrise at Pittsburgh (location of the I-A station) is always earlier than 6 AM at Los Angeles, and KGBS therefore operates before that hour. We do not now consider the relief requested, both because such operation would not be in compliance with the Canadian agreement and because the request was not timely advanced, being an affirmative request for modification of the decision and rules advanced in an opposition to CCBS rather than in a petition. As mentioned, this subject will be discussed with Canada. Possible relief in this respect may be forthcoming later; for the time being we must adhere to the decision reached, and after October 28 operation by KGBS may commence only at 6 AM Pacific standard time.[30]

51. The other two petitions for reconsideration by Class II limited time stations (WHCU, Ithaca, New York, and WHLO, Akron, Ohio) on I-A channels – both east of

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[30] Pre-sunrise operation by KGBS must be viewed in the light of its impact on Class II-A station KSWS, Roswell, N.M., especially since Class II-A stations are especially designed to serve wide areas not having other nighttime primary service.

the dominant station and therefore precluded from pre-sunrise operation under the new rules – both present highly individualized situations and therefore (as CCBS asserts) do not warrant reconsideration in this proceeding. Both have also requested waiver of the eligibility provisions of the new rules.

52. Former Section 73.87(a)(2) of the Rules was ambiguous as to their pre-sunrise privileges but, in any event, called for protection of the dominant station's 0.5 mv/m 50% skywave contour or consent by the dominant station. The only Class II stations in this category known to be signing on prior to local sunrise are WHCU and WHLO. Both have been operating pre-sunrise, and both seek to continue pre-sunrise operation on the basis of 6:00 a.m./500 watts. WHCU (Cornell University) operates on 870 kc/s, to which WWL, New Orleans, holds the I-A nighttime priority. WWL is aware of the operation and thus far has not objected thereto. Because of the northward directionalization of WWL's signal, WHCU would have to reduce power to less than 5 watts in order to afford 0.5 mv/m 50% skywave protection. In the case of WHLO, the dominant station is 2000 miles away (KFI, Los Angeles, California); WHLO could sign on at 6:00 a.m. (or sunrise, Newfoundland, whichever is later, to protect the Canadian 1-B co-channel assignment there) with a power of 500 watts, without infringing KFI's 0.5 mv/m 50% skywave contour. WHLO's situation is further complicated, however, by adjudicatory proceedings in Docket No. 11290, in which Radio Station WOI is seeking a Special Service Authorization (SSA) for early morning operation at Ames, Iowa.

53. Under the circumstances, it is believed that a Further Notice of Proposed Rule Making should be issued in Docket No. 17562 (pre-sunrise operation by Class II stations assigned to U.S. 1-A clear channels) to

deal specifically with the question of Class II daytime and limited time stations located *east* of a co-channel U.S. 1-A. Among other things, the Further Notice will explore the degree protection which should be afforded to Class I-A stations under these circumstances – at present, their basic protection derives from the exclusivity of the 1-A nighttime priority within the North American Region. The public interest factors inherent in agreements by Class I-A stations to permit pre-sunrise usages of this type would also have to be explored. Until these matters are resolved by further rule making, we are withholding action on the WHCU/WHLO pre-sunrise proposals and hold that their existing operations must, in line with the June 28 Report and Order, be terminated on October 28, 1967, along with other non-conforming operations. It is noted that Cornell University operates a Class B FM broadcast station at Ithaca, on which the deleted early morning AM programming could be carried, and, in the case of Akron, that there are two fulltime standard broadcast stations there authorized for five kilowatt operation, day and night (WSLR and WAKR).

54. The remaining Class II petition is that of WTPR, Paris, Tenn. Whether treated as a petition for reconsideration or waiver, we do not believe favorable consideration is justified. Conditions on the I-B channels (like the regional channels) are considerably different from the I-A channels, due partly to their geographic distribution throughout North America. We note in this connection that WTPR has a Class A FM authorization.

Other Matters

55. *Language of Section 73.99(f)*: Section 73.99(f) states that a PSA is "secondary" and subject to modification, suspension or termination without notice

or hearing, "if necessary to resolve interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action." DBA and a number of petitioning daytimers object to this provision, regarding it as in effect giving them little more than the "permissive" privilege they had before. It is urged that a PSA is in effect a license, and the Commission cannot, consistent with the Administrative Procedure Act and Section 316 of the Communications Act, create a license on such uncertain terms.

56. We do not accept the legal argument; in our view, considering the nature of the PSA and the circumstances giving rise to it, it is entirely within our authority to condition it in any fashion which appears appropriate.[31] However, it was not intended to be used in any wholesale fashion such as that to which these parties express concern. It was intended to take into account certain types of situations: (1) where a new station is authorized in a foreign country, particularly Canada, which is closer to a given U.S. station that previous assignments in the foreign country on the frequency, and therefore an additional degree of protection is required; (2) where, in the issuance of the PSA initially, a too-high or too-low power level is authorized and must be adjusted to meet the requirements of international agreements or protection of U.S. Class I stations; or (3) changes in operation, such as changes in antenna efficiency, requiring a different power to be specified. Finally, legal uncertainties (such as that posed by the stay order entered October 2, 1967, by the U.S. Court of Appeals in New York against the grant of interfering PSA's on 930 kc/s – *WBEN, Inc. v. USA &*

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[31] The situation is somewhat analogous to Program Test Authorizations issued under Part 73 of the Rules – see *CBS of California v. FCC*, 10 RR 2021 (1954).

FCC) – require that the maximum administrative flexibility be retained. We are therefore not adopting the suggested changes in Section 73.99(f).

57. *Waiver of the first class operator and remote control rules*: Some petitioners representing fulltime interests ask for a relaxation of the first class operator and remote control requirements in connection with PSA pre-sunrise operation. The operator rule (Section 73.93) requires, among other things, the attendance of a radiotelephone first class operator during all periods of directional operation; Section 73.67(a)(6) – remote control operation – provides that, during periods of directional operation, the indications at the transmitter of common point current, base currents, phase monitor sample loop currents, and phase indications, be read and entered in the operating log once each day for each pattern within *two hours* after the commencement of operation for each pattern.

58. With respect to the first class operator requirement for AM directional operation, we concluded in 1964 (in reconsideration of rule making in Docket No. 14746) that the state of the art had not progressed to the point that the attendance of a first class operator could be dispensed with. We do not know whether the situation has changed sufficiently in the last three years to warrant a different conclusion at this time, but in any event we are of the view that this issue should be dealt with, if at all, in a separate proceeding and should not be injected into the pre-sunrise proceeding. As to the observation and logging of the required indications, at the transmitter, the problem of repetitive visits to the transmitter site arises mainly where the station is authorized for directional daytime operation and the PSA time-spread runs beyond two hours. This problem will be dealt with administratively in the processing of

PSA proposals and associated waiver requests. We are therefore not amending the rules to recognize these comparatively rare situations.

59. *Request to operate with 124 mv/m in directional "nulls"*: As mentioned above, ABS asks that fulltime stations now operating directionally during the pre-sunrise period be permitted to radiate up to 124 mv/m (the minimum equivalent of 500 watts non-directionally) rather than suppressing radiation to the degree required by their licenses. We cannot agree with this in principle, since such nulls are normally designed to protect other fulltime stations. Moreover, this proposal would entail a third mode of operation, whereas the solution contained in our June 28 Report and Order was based on the use of daytime facilities, adjusted in accordance with the agreement with Canada. This proposal must therefore be rejected.

60. *Waiver requests*: In addition to the 23 petitions discussed, 1200-odd PSA proposals had been received by the close of business October 4, 1967. Approximately three percent of these are accompanied by waiver requests. The majority of the waiver requests are by daytime-only stations seeking PSA sign-on times earlier than 6:00 a.m. standard time. Most of these will achieve substantial satisfaction of the requirements if we are successful in redefining the 6:00 a.m. PSA sign-on in terms of prevailing local time, rather than standard time. In a lesser but significant number of cases, waivers of the 500-watt PSA power ceiling are requested. A small but undetermined number of these will benefit from our decision to permit powers in excess of 500 watts on the basis of full domestic nighttime protection (in addition to foreign).

61. Roughly half of the requests for waiver of the time and/or power limitations laid down in the June 28

Report and Order were specifically premised on farm area coverage, or program services designed for foreign language or other minority groups. Apart from the legal, engineering, and administrative impediments already discussed, we are of the view that the granting waivers on showings of this sort would be unsound as a matter of policy. Since all programming is unique in one way or another, it is obvious that official preferences (expressed by way of selective waiver criteria or otherwise) would be a highly subjective matter and of doubtful validity. Moreover, waiver decisions based on programming would, in the long run, be undermined by changes in station ownership and resulting changes in programming. Obviously, these are matters which defy prediction and regulation in the context of pre-sunrise operating privileges. These arguments must therefore be rejected.

62. Several waiver requests are predicated on inability to obtain suitable equipment; at least one licensee (KGAY, Salem, Oregon) requests a 90-day extension of the October 28 deadline on existing operations, based on inability to obtain a used auxiliary transmitter before that date. Inasmuch as there is no objection to improvised methods of power reduction to meet the new requirements until suitable equipment can be acquired, we find these requests to be without merit. For example, there would be no objection to the installation of a series dropping resistor in the transmission line on the transmitter side of the antenna ammeter, as a temporary means of achieving compliance with the rules. While this and similar methods may result in unnecessary power consumption, this fact alone does not warrant the issuance of temporary waivers.

63. In at least one case (WPDM, Potsdam, New York), the PSA applicant is only 81 miles (site-to-site) from a Canadian co-channel fulltimer (CFOX, Pointe

Claire, Que.). Although the new Figure 12 curves cut off at 100 miles, the consultant obtained a 126-watt permissible radiation value by extrapolation of the applicable curve. Although not contemplated by the agreement with Canada, we proposed that this and similar situations involving short spacings be referred to Canada for ad hoc consideration.

64. In accordance with the foregoing, waiver requests accompanying PSA proposals will be dealt with under the following guidelines:

(a) Waiver request for times or powers in excess of the 6:00 a.m./500-watt formula laid down in the June 28 Report and Order will be denied, *except* that as to power, proposals in excess of 500 watts (into the daytime antenna system) will be considered and granted on the basis of conventional *domestic nighttime protection* (in addition to the usual foreign protection showings).

(b) Waiver requests premised on equipment considerations will be denied, but improvised methods of power reduction may be used on a temporary basis if promptly reported to the Commission.

(c) Waiver requests beyond the scope of rule making in Docket Nos. 14419 and 17562, for example, waiver requests by Class IV stations and Class II stations assigned to foreign I-A clear channels, will be denied.

(d) Action on PSA proposals by Class II stations located east of a co-channel U.S. I-A dominant, will be withheld pending outcome of the Further Notice of Proposed Rule

Making adopted this day in Docket No. 17562.

(e) Action on PSA proposals involving Canadian co-channel separations of less than 100 miles will be withheld, awaiting ad hoc clearance with Canada.

(f) Action on all PSA proposals for 930 kc/s which are potential sources of new interference to WBEN's licensed nighttime operation will be withheld, until the New York Court of Appeals has ruled on the merits of *WBEN, Inc. v. USA and FCC,* Case No. 31688.

65. In view of the foregoing, IT IS ORDERED, That:

(a) The June 28, 1967 Report and Order in Docket No. 14419, together with Sections 73.87 and 73.99 of the Commission's Rules as amended and adopted therein, IS AFFIRMED.

(b) Except as indicated hereinabove, the petitions for stay and reconsideration listed in the Appendix ARE DENIED.

(c) Existing pre-sunrise operations on 930 kc/s by stations having PSA proposals on file (but not presently grantable because of the outstanding stay order involving this frequency) may continue beyond October 28, 1967, pending final outcome of *WBEN, Inc. v. USA & FCC* (Case No. 31688, U. S. Court of Appeals, Second Circuit), but such operations shall be adjusted in

accordance with the agreement with Canada respecting time and permissible power.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

*See attached statement of Commissioner Cox.

APPENDIX

A. Earl Cullum, Jr.
American Broadcasting Company, Inc. on behalf of:

KABC, Los Angeles, California
KQV, Pittsburgh, Pennsylvania
WXYZ, Detroit, Michigan

Association on Broadcasting Standards, Inc. (ABS)
Clear Channel Broadcasting Service (CCBS)

KFI, Los Angeles, California
WSM, Nashville, Tennessee
WLW, Cincinnati, Ohio
WGN, Chicago, Illinois
WSB, Atlanta, Georgia
WJR, Detroit, Michigan
WFAA, Dallas, Texas
WBAP, Fort Worth, Texas
WHAS, Louisville, Kentucky
WHO, Des Moines, Iowa
KSL, Salt Lake City, Utah

Comal Broadcasting Company (KGNB)
Cornell University (WHCU)
Daytime Broadcasters Association (DBA)
Garden Spot Broadcasters, Inc. (WGSA)
Golden Plains, Inc. (KXXX)
Greater Indianapolis Broadcasting Company, Inc. (WXLW)
Group One Broadcasting Co. of Texas (KBOX)
Hudson Broadcasting Corp. (WCMB)
Inquirer Printing Company (WBFD)
Kimball Broadcasting Inc. (WNAM)
May Broadcasting Company (KMA)
McQueen and Company, Inc. (WTRO)
Minneapolis-St. Paul Radio Broadcasters (KQRS)
Musical Heights, Inc. (WHMI)
Paris Broadcasting Co. (WTPR)

Pemiscot Broadcasters (KCRV)
Radio Akron, Inc. (WHLO)
Radio Athens, Inc. (WATH)
Radio Jax, Inc. (WZOK)
Radio Station KXYZ, Inc. (KXYZ)
Richard C. Brandt (KCOB)
RMC Productions, Inc. (WALY)
Starr Broadcasting Group, Inc. (KOWH)
Sunland Broadcasting Company, Inc. (KIZZ)
Town and Farm Co., Inc. (KMMJ)
Union Lake Broadcasters, Inc. (WMVB)
VIP Broadcasting Corporation (WVIP)
Westport Broadcasting Company (WMMM)
Whitcom, Inc. (WGHQ)
WHUT Broadcasting Company (WHUT)
Wisconsin Valley Television Corporation (WSAU)

STATEMENT OF COMMISSIONER KENNETH A. COX
CONCURRING IN PART AND DISSENTING IN PART

I concur in the denial of the petitions for reconsideration except that I would grant reconsideration to the extent necessary to bar daytime-only stations which have never operated before sunrise from taking advantage of the new rules. There are a substantial number of these stations which have been authorized subject to the condition that they not operate pre-sunrise until this proceeding is concluded. Since they have never provided a service upon which the public has come to rely, and since they sought their authorizations with full knowledge that they might not be permitted to operate before sunrise, I would bar them from such operation in order to cutoff the continued increase in interference which will be caused by constantly expanding pre-sunrise service to the licensed operation of full time stations. I therefore dissent to this action insofar as it contemplates that every daytime station licensed in the future – although its engineering qualifications are measured by daytime standards – is to be allowed to operate pre-sunrise as well.

IN THE UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, nineteen hundred and sixty eight.

PRESENT:

Hon. J. Edward Lumbard,
Chief Judge
Hon. Henry J. Friendly,
Hon. Robert P. Anderson,
Circuit Judges

ASSOCIATION ON BROADCASTING STANDARDS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents

ROCKLAND BROADCASTERS
UNIQUITOUS CORPORATION,
CHRISTIAN BROADCASTING CORPORATION,
5KW, INC.,
HEART OF GEORGIA BROADCASTERS, INC.,
AND
THREE TOWERS' INC., AND LICENSEES,

Intervenors.

A Petition for Review of a report and order of the Federal Communications Commission.

This cause came on to be heard on a Petition for Review and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the Petition for Review be and it hereby is denied.

A. DANIEL FUSARO*
Clerk

*Identical Judgments were simultaneously rendered in Case Nos. 346, 402, and 403 below.

OPINION OF

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 346, 347, 402, 403, 409—September Term, 1967.

(Argued March 21, 1968 Decided May 10, 1968.)

Docket Nos. 31688, 31835, 31923, 32018, 31988

WBEN, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ASSOCIATION ON BROADCASTING STANDARDS, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

ROCKLAND BROADCASTERS, UBIQUITOUS CORPORATION, CHRISTIAN BROADCASTING CORPORATION, 5 KW, INC., HEART OF GEORGIA BROADCASTERS, INC., THREE TOWERS, INCORPORATED, BEXAR BROADCASTING CO., INC., WEST JERSEY BROADCASTING CO., INC., SANTEE BROADCASTING CO., INC.,

CRANSTON-WARWICK RADIO, INC., RADIO NEWARK, INC., NORTH SHORE BROADCASTING CO., INC., CALL OF HOUSTON, INC., NORTH MONTANA BROADCASTERS, INC., WOMETCO SKY-WAY BROADCASTING COMPANY, SARKES TARZIAN, INC., WNOW, INC., WAEB BROADCASTERS, INC., THE OHIO RIVER BROADCASTING CORP., ELECTRA BROADCASTING CORP., JOHN A. EGLE, tr/as Little Eagle Broadcasting, CENTRAL BROADCASTING CORP., WAYNE M. NELSON, and ROLLINS, INC.,

Intervenors.

PACIFIC AND SOUTHERN COMPANY, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

ASSOCIATION ON BROADCASTING STANDARDS, INC., RADIO OLEAN, INC., TECHELAND BROADCASTING, INC.,

Intervenors.

KING'S GARDEN, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

GOLDEN PLAINS INCORPORATED,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

KLAMATH BROADCASTING CO., KULA BROADCASTING CORP., MAY BROADCASTING COMPANY, UNITED COMMUNICATIONS, INC., WILLIAM F. HUFFMAN RADIO, INC., KIMBALL BROADCASTING, INC., FORWARD COMMUNICATIONS CORPORATION, HUDSON BROADCASTING CORP., GROUP ONE BROADCASTING CO. OF TEXAS, MINNEAPOLIS-ST. PAUL BROADCASTERS, SALTER BROADCASTING COMPANY, WHUT BROADCASTING COMPANY, INC., K. L. BROADCASTING, INC., and AMERICAN BROADCASTING CO., INC.,

Intervenors.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and ANDERSON, *Circuit Judges.*

Petitions to review a report and order of the Federal Communications Commission, 8 F. C. C. 2d 698 (1967), amending Part 73 of the Commission's Rules to establish a new system of "presunrise" operation by certain classes of AM radio stations, and an opinion and order, 10 F. C. C. 2d 283 (1967), denying reconsideration. Petitions denied.

ROBERT L. HEALD (Fletcher, Heald, Powell, Kenehan & Dildreth, Washington, D. C.; Frank U. Fletcher, Edward F. Kenehan, James P. Riley, on brief), *for Petitioner WBEN, Inc.*

WILLIAM J. POTTS, Washington, D. C. (Michael H. Bader, Washington, D. C., on brief), *for Petitioner Association of Broadcasting Standards.*

MORTON L. BERFIELD (Cohen & Berfield, Washington, D. C.; Lewis I. Cohen, Gennaro D. Caliendo, on brief), *for Petitioner King's Garden, Inc.*

JOHN L. TIERNEY (McKenna & Wilkinson, Washington, D. C.; James A. McKenna, Vernon L. Wilkinson, on brief), *for Petitioner Golden Plains, Inc.*

LAUREN A. COLBY, Washington, D. C., *for Intervenors Rockland Broadcasters; Ubiquitous Corp.; Christian Broadcasting Corp.; 5 KW, Inc.; Heart of Georgia, Inc.; Three Towers, Inc.; Bexar Broadcasting Co., Inc., and others.*

MCKENNA & WILKINSON on the briefs, *for Intervenor American Broadcasting Co., Inc. and for Intervenors Klamath Broadcasting Co., Plains Radio Broadcasting Co., Golden West Broadcasters, et al.*

JOHN H. CONLIN, Associate General Counsel (Henry Geller, General Counsel, William L. Fishman, Counsel, Donald F. Turner, Ass't U. S. Attorney General, Gregory B. Hovendon, Attorney, Department of Justice, Washington, D. C.), *for Respondents Federal Communications Commission and United States of America.*

FRIENDLY, *Circuit Judge*:

As a result of proceedings in several courts of appeals unnecessary to detail we have before us a number of petitions, under 28 U. S. C. §2342(1), for review of orders of the Federal Communications Commission, reported in 8 F. C. C. 2d 698 (1967), and 10 F. C. C. 2d 283 (1967), which amend Part 73 of the Commission's Rules so as to establish a changed pattern for presunrise operation by certain classes of AM radio stations. While the petitions raise many substantial questions, both substantive and procedural, which have demanded extensive consideration and discussion, we sustain the Commission.

From its very beginning, federal regulation of standard AM radio service has been complicated by the fact that radio waves do not act in the same way when the sun is up as when down. During the day, the part of the radio signal directed skyward (the "skywave") is dissipated in the atmosphere, and only the portion moving parallel to the ground (the "groundwave") provides useful service. At night, however, the ionosphere reflects the skywave signal back to earth, and if the skywave is strong enough, a station can land an audible signal in large areas that its groundwave does not reach. This, however, is not an unmixed blessing. If the skywave lands in an area already receiving service from another station on the same frequency, the two signals may destroy one another so that only garbled noises will be audible.

The Commission has attempted to fashion a nighttime allocation pattern that will maximize the number of listeners who will benefit from skywave service and yet permit as many listeners as possible a wide choice of program, preferably of nearby origination. The AM band has been divided into three parts for these purposes. On

46 Clear Channels wide area service is the Commission's dominant goal. Twenty-four of these channels are occupied by one Class I-A station of high power, whose skywave and groundwave are given maximum protection. 47 C. F. R. §73.25(a) (1967). At the most, only one other station in Class II is permitted to operate at night on these channels, and the power and direction of the subordinate station's signal is limited so that it will not cause undue interference. Other Class II stations occupying these channels are limited to daytime broadcasting, where the skywave is of no concern. The other 22 Clear Channels are intended to serve the same purpose as the ones we have just discussed. They differ only in that each is occupied at night by two or more dominant stations in Class I-B and, often, by several subordinate stations in Class II.[1] The overwhelming majority of the Class II stations, however, are limited to daytime broadcasts.[2] By this careful allocation pattern, the Commission has succeeded in providing skywave radio service to some 20,000,000 persons who would not receive any groundwave signal at night.

Complementing the Clear Channel stations are the stations of moderate power in Class III that are located on 41 "regional" channels. These stations are expected to provide large numbers of listeners with one or more programs originating closer to home. Since many more stations occupy a given channel at night, regional broadcasters generally do not have a usable skywave service. 47 C. F. R.

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1 Other channels are reserved for Class I-A and I-B stations in other nations of North America. See North American Regional Broadcasting Agreement, Appendix A, Tables I and II, 11 U. S. T. & I. O. A. 415, 446-47 (1960).

2 There are 926 Class II daytime or limited time American stations on Clear Channels, but 509 of them are assigned to Canadian, Mexican or Bahamian Class I-A frequencies and are beyond the scope of this proceeding.

§73.182(e), (v) (1967). Steps must be taken, however, to guarantee that one station's skywave signal will not interfere with another's groundwave. Consequently, of the 858 Class III stations permitted to operate by night, only 90 operate with the same facilities they are allowed to use by day. Moreover, 1200 additional Class III stations are restricted to daytime only broadcasting to insure against interference.

To supplement the services provided by the regional broadcasters, a large number of low power Class IV stations are assigned to six local channels. Their night operations are limited in a similar manner.

The Commission's Earlier Efforts as to Presunrise Operation.

The shift from nighttime to daytime ionospheric conditions does not take place the instant the sun rises; instead, the skywave signal weakens gradually from two hours before dawn, and it is not until two hours after sunrise that true daytime conditions exist. It is the Commission's effort to regulate broadcasting during the transitional presunrise period with which we are here concerned. In 1941, the agency promulgated special rules, which remained substantially intact until the rule-making proceeding now under review, to govern the conflicting interest of daytimers and fulltimers during the pre-dawn hours of transition. Under old rule 73.87, quoted in the margin,[3] all

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3 §73.87. Program transmissions prior to local sunrise.

(a) The provisions of §§73.6, 73.8, 73.9, 73.10, 73.23, 73.79, and 73.84 shall not prevent the transmission of programs between 4 o'clock a.m., local standard time, and local sunrise, of standard broadcast stations with their authorized daytime facilities: *Provided*, That the provisions of this section shall not extend to:

(1) Stations regularly sharing time during daytime hours either under licenses pursuant to which time-sharing agreements have been entered

restricted stations, except for those in Class IV and certain ones in Class II, could begin broadcasting at *full daytime power* from *4 A.M.* If, however, undue interference to fulltime stations resulted, the Commission had the right to suspend such pre-dawn operations summarily, pending a hearing on the interference question. *Music Broadcasting Co.* v. *F. C. C.*, 217 F. 2d 339 (D. C. Cir. 1954). Although the principal beneficiaries of the rule were Class III stations whose nighttime operations were limited or banned entirely, a substantial number of Class I-B and Class II stations took advantage of its provisions as well.

While this system worked relatively well during its early years, it was subjected to increasing strain as the number of AM stations increased from 882 in 1941 to the present

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into or licenses specifying hours of operation, unless time-sharing agreements have been reached covering such operation prior to local sunrise. Sections 73.74, 73.77, and 73.78 shall be applicable to such agreements.

(2) Any Class II station which by use of its daytime facilities causes objectionable interference, as determined by the standard broadcast Technical Standards of this subpart or by the engineering standards of NARBA or the U. S./Mexican Agreement (whichever is controlling) within the 0.5 mv/m 50 percent time skywave contour of any Class I station of the United States, Mexico, or any country party to NARBA, except (i) where the Class I station is located east of the Class II station, in which case operation may begin at local sunrise at the Class I station; (ii) where an agreement has been reached with the United States Class I station affected to begin operation prior to local sunrise.

(3) Operation by use of its daytime facilities of any Class II station on any Class I-A channel not assigned to the United States under the North American Regional Broadcasting Agreement or under the U. S./Mexican Agreement.

(4) Class IV stations authorized for operation with daytime power in excess of 250 watts.

(b) Any station operating during such hours receiving notice from the Commission that undue interference is caused shall refrain from such operation during such hours pending further notice from the Commission.

(c) Nothing contained in outstanding instruments of authorization for such stations shall prohibit such operation except as herein provided.

4250, and the number of daytimers mushroomed from 60 to 2180. Interference complaints from dominant fulltimers naturally increased, leading to summary termination of the daytimers' pre-dawn services. Indeed, some of the fulltimers on the particularly crowded regional channels indicated they would complain more often but for the fact that the airwaves had become so full that it was impossible to identify the interfering daytimer within a reasonable period of time. Moreover, it was reasonable to expect that the fulltimers would exercise increasing vigilance over their channels, for the presunrise hours had taken on a new economic importance in an era in which the largest radio audiences were to be reached during the time America was driving to work.

The daytimers, too, were becoming increasingly restive with the terms of a compromise which promised to become increasingly unfavorable to their interests. In 1957, the Commission began a study of a proposal, sponsored by their Association, which would have given them the right to operate from 5 A.M. to 7 P.M. regardless of the amount of interference this would cause the dominant fulltimers. This was rejected in 1958, *Daytime Standard Broadcast Stations,* 17 R. R. 1669. A somewhat more modest proposal, permitting operation from 6 A.M. to 6 P.M., suffered a similar fate a year later, *Extended Hours for Daytime Operation,* 26 F. C. C. 53.

The Instant Proceedings.

In 1960, however, the old regime was again put into question when the Senate ratified a new North American Broadcasting Agreement which, as we shall describe at a later point, made it clear that the presunrise operations of at least half of the stations taking advantage of Rule 73.87 were in violation of our international commitments. In

response to the treaty and to the complaints of the fulltimers, the Commission issued a Notice of Proposed Rule Making on December 6, 1961, which initiated the proceedings now under review. This proposal would have revised the status quo in the fulltimers' favor. The plan would have forbidden presunrise broadcasting by all restricted stations, except those Class III stations already operating. As to these, the Commission proposed new rules which would have made it much easier for dominant stations to establish their interference claims.

The daytimers were not inactive in the face of this threat. On July 2, 1962, the House of Representatives passed a bill, H. R. 4749, which would have permitted daytimers of whatever class to begin broadcasting at full power at 6 A.M., or 4 A.M. if they had done so before, where there was no fulltimer operating in the same community. Affected fulltimers were required to make a substantial showing of interference before they would have a right to a hearing and this, unlike the summary procedure under Rule 73.87, would lead to termination of the daytimer's service only if the Commission found that the latter did not better serve the public interest.[4]

In response to this legislative effort, which the agency opposed and which died in the Senate, the Commission issued a Further Notice of Proposed Rulemaking. This sought to recognize the daytimers' claim, aired both in Congress and in the prior rulemaking proceedings, that because they broadcast information of great importance to their local communities, they should be permitted to broadcast during the early morning hours regardless of the interference this would cause the fulltimers, whose broad-

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4 Daytime stations located in the same community as a fulltimer could become eligible upon a showing that they would not cause harmful interference over a substantial portion of another station's service area.

casting could not take into full account the needs of all the communities that were dependent upon them at night. The Commission recognized, however, that though the local service of the daytimers was valuable, these stations could not be permitted to broadcast during the pre-dawn hours on the same basis that they did by day. For the studies it had made in its prior proceedings indicated that, because of skywave interference, the number of listeners who would be deprived by interference of service provided by the full-timers would "far exceed" the number of listeners who would gain by the distinctive character of the daytimers' local coverage. Consequently, to cut down service losses to an acceptable figure, the Commission proposed to limit the daytimers' presunrise operation in four ways. First, it would permit only those daytimers located in a community which was not served by a local fulltimer to operate before dawn. Listeners located in other areas, it reasoned, already had access to early morning local news. Second, it proposed that the daytimers' power should be no more than 500 watts during the transitional period. This, it suggested, was enough to reach the local community. Third, daytimers could not begin operating before six in the morning. Finally, the dispensation was limited to those daytimers in Class III who occupied regional channels on which full-timer skywave service was not a factor. As for Class II daytimers, occupying "Clear Channels," a different regime would apply. Only those daytimers located to the west of all dominant Class I stations could broadcast before dawn but, in contrast to the system for Class III, no fixed starting time or power limitation was set. Rather daytimers in this class could begin operations at the time the sun rose at the westernmost Class I station—for at that time much of the dominant station's skywave would become useless.

Comments were invited and some 300 stations responded formally, as did the associations representing interested groups of fulltimers and daytimers. On June 28, 1967, after negotiating a supplementary agreement with Canada consistent with its disposition, the Commission reached its decision, which, in general, favored the daytimers more than its original proposal. While the limitations on starting time and power[5] were retained for Class III stations, *all* daytimers of this class were permitted to take advantage of the new rule. The new dispensation was also broadened to include the many Class III fulltimers whose operations were restricted at night, thereby permitting them to offset in some cases the impact of the increased interference the daytimers would cause. Class II stations were treated much more restrictively, in keeping with the Commission's effort at maintaining the integrity of skywave service on Clear Channels. Class II stations located on a I-B channel, which under FCC regulations may be authorized to broadcast during the day with up to 50,000 watts power, could begin their daytime broadcasting at 500 watts at 6 A.M., provided this was later than sunrise at the westernmost Class I station to the east. However, one important limitation on this authority was imposed—only such power could be used as did not interfere with the skywave service provided by the dominant stations located to the west, where the sun had not yet risen. Class II stations operating on a domestic I-A channel were treated differently. If they were located to the east of the dominant station, no presunrise operations were to be permitted at all; if to the west, they could begin operating at full daytime power from 6 A.M. or sunrise at the dominant station (whichever was later), pend-

5 Power was to be reduced below 500 watts insofar as this was required by our international obligations.

ing decision in another proceeding as to whether a limitation on power was appropriate on these channels as well.

Thus, the Commission's decision alters the prior allocation pattern decisively. Limited pre-dawn broadcasting rights are granted daytimers on a broad scale where formerly more ample privileges had been granted on the sufferance of the increasingly vigilant fulltimers.

The Positions of the Parties

Like all compromises this has not succeeded in pleasing everybody. Some fulltimers complain that daytimers are allowed to operate too much and some daytimers complain that they are allowed to operate too little. Specifically WBEN, a full time Class III station, and the Association of Broadcasting Standards, Inc.—a group representing Class II and Class III stations operating both day and night—object insofar as daytime operation is permitted from 6 A.M. regardless of the amount of interference to a fulltimer's signal this might cause. On the other hand, a number of Class II and Class III stations, whose operations are either limited[6] or banned[7] at night, protest because they had previously been broadcasting between 4 A.M. and sunrise at their full daytime power and the decision has forced them to curtail their operations although no fulltimer has complained of their causing undue interference. A third group of stations have intervened in support of the order.[8] Their position is explained by the fact that when the Commission inaugurated these proceedings, it forbade any new restricted stations licensed after Janu-

6 Stations in this group are KMA, KAGO, WFHR, WNAM, WSAU, WCMB, KBOX, KQRS, WBEL, KBEA, KQV, KXYZ, KABC.

7 Stations in this group are KXXX, KGDN, WHUT, and KMMJ.

8 Rockland Broadcasters; Ubiquitous Corporation; Christian Broadcasting Corporation; 5 KW, Inc.; Heart of Georgia Broadcasters, Inc.; Three Towers, Inc.; Bexar Broadcasting Co., Inc.

ary 29, 1962, from broadcasting before sunrise; such stations naturally welcome a decision that permits them to broadcast presunrise on the same basis as their elders. Since no complaint is made by the Class I stations we must assume that the decision adequately protects their presunrise skywave service.

The Claim of Arbitrary and Capricious Action

We address ourselves immediately to perhaps the most serious question in the case—the contention of the fulltimers that, despite the length of the Commission's opinions, the new rules are based on an analysis so scanty and superficial as to be arbitrary and capricious. They point to the Commission's admission that "it may well be true, as [the fulltimers] urge, that the losses will often, perhaps usually, exceed the gains if strict engineering standards are applied," and argue that, this being so, the Commission was obliged to estimate with precision the number of listeners who would gain and lose service as a consequence of its decision before it could rationally proceed. The agency responds that its analysis of the qualitative differences in the needs of the various classes of listeners affected was sufficiently compelling that it could rely on its expertise to form a rough assessment of their number.

In order to assess the weight of these competing claims, it is necessary to outline the Commission's analysis. As the fulltimers' more substantial complaint centers upon the Commission's failure to quantify the number of listeners they will lose, we shall consider this point first.

Listeners of two types will lose fulltimer service between 6 A.M. and sunrise as a result of the Commission's decision. First, interference will sometimes deprive listeners relatively near the transmitter of local broadcasts. Second, service to contiguous rural areas will be impaired. As to

nearby listeners, the Commission argues that since fulltimers are generally located in cities of substantial size, provided "with a plethora of locally originated services," the loss of service to some listeners should be discounted by the fact that local programs on other frequencies will be generally available to them. The agency points out that of the 107 communities served by Class III fulltimers filing comments in this proceeding, only 16 rely exclusively upon one nearby fulltimer.[9] This distribution pattern, it claims, is typical of its general experience, and reveals the inadequacy of a decision based principally on a head count. While many of the fulltimers made detailed showings as to the number of listeners deprived of their own services, only one, WREC, made a similar showing as to the number of listeners deprived of all groundwave service. Moreover, the Commission pointed out that the amount of FM service available to fulltimer communities exceeded that available to areas served only by daytimers.[10]

Turning to the rural areas served by Class III fulltimers, the Commission also stressed that because of the distribution of these stations, alternative regional services will

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9 Sixty-five have one or more additional fulltime stations in Class III or higher; fourteen have another fulltime Class IV station; and nine are in urbanized areas containing many fulltime stations.

10 Of the 135 communities represented by the daytime stations filing comments, fifty-three have FM stations. Twenty-two, however, are not assigned an FM frequency in the Commission's Allocation Table. Other communities also have no assignment, but since they are in urbanized areas, "channels might be available under the '25 mile rule' [permitting the shift of a frequency assignment from a community within 25 miles already receiving such service], or possibly additional assignments might be available through rule making; but a substantial number of these situations are in areas where channels are scarce and the making of additional assignments is not always possible however desirable it might be."

On the other hand, more than half of the fulltime Class III stations filing have associated FM facilities and another 17 could take advantage of unoccupied channels.

often be available. In addition, "[with] few exceptions the fulltimers did not establish the extent to which listeners in such areas (usually at some distance from the station) actually rely on and need their service." Although it was not explicitly stated that Class I stations had made satisfactory showings in this respect,[11] the Commission relied on the service, both groundwave and skywave, provided by these stations to cushion the loss.

It thus becomes clear that the agency's decision on this aspect of the case hinges upon its claim that the listener who will lose the service of a regional fulltimer will generally have reasonably satisfactory alternative broadcasting available. Since this is a valid consideration, if the Commission were required to quantify the number of listeners who would lose service, it would not be sufficient to know that the signal of any particular station was going to be destroyed over a given area but how *all* the available signals would be affected. Yet to determine this would be an enormous task, and one on which the parties have not assisted the Commission in any meaningful way.

When seen from this perspective, the most persuasive argument made by the fulltimers in support of their position falls. They point out that in its earlier decisions of 1958 and 1959, in which similar daytimer claims for presunrise operation were rejected, the Commission demonstrated no similar reluctance to estimate the number of listeners who stood to lose by the grant of a general dispensation. And the fulltimers urge that the agency's headcounts in these proceedings demonstrate that the reason for the failure to undertake a similar study in this proceeding was the Commission's awareness that such a count would show service losses so outstripping gains that no

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11 Such a finding was made, however, in the Commission's 1958 decision. 17 R. R. at 1692.

"qualitative analysis" would permit it to reach the desired conclusion.

However, the Commission's conscientious efforts at quantification in its earlier proceedings show rather the difficulty of deriving figures really relevant under its present analysis. In its 1958 decision, rejecting a uniform starting time of 5 A.M., the Commission was capable of quantifying the service loss that *each* of 168 stations, submitting data on the question, would suffer two hours before sunrise. However, it was unable to determine on the basis of this data and certain other submissions directed precisely at this point, the number of listeners who would be without any A.M. groundwave service at all. Instead, much as was done here, the Commission made a rough assessment on this issue concluding simply that "very considerable" areas would be so deprived. 17 R.R. at 1679. The Commission's decision a year later, in which a 6 A.M. starting time was rejected, treated the question similarly. It could only enumerate the "25,631,000 persons in 1,727,000 square miles, now receiving *skywave* service" (emphasis supplied) who it could predict "would lose entirely the standard broadcast service now available to them." 27 F. C. C. at 60.

But this finding is of no use to petitioners. For the rule adopted in the present proceeding differs from those previously considered precisely in that it forbids presunrise operations by those Class II daytimers who would interfere with the skywave service provided by the stations in Class I. Moreover, the present rule, unlike its proposed predecessors, also protects the groundwave service provided by Class I stations. This undermines the force the fulltimers would have us give the service loss calculations made in earlier proceedings. For example, the fulltimers

emphasize particularly the Commission's 1958 conclusion that 24 fulltime stations could no longer reach 27,513,881 persons by groundwave if all daytimers in Classes II and III would be permitted to broadcast one hour before sunrise. But of the 24 stations providing the Commission with this information, only eight were on regional channels—and these accounted for only 2,264,000 of the potential listeners, 8% of the total loss.[12] Even this figure, as we have suggested, does not indicate the number of persons deprived of all groundwave service by the Commission's present decision—rather it represents the aggregate of the loss suffered by each station taken individually. For example, WAMP, one of the eight regionals submitting data, reported that it would lose 885,000 potential listeners one hour before sunrise, a figure amounting to one third of the total Class III loss. However, this station is located in Pittsburgh, Pa. and the Pittsburgh area is also served by a Class I-A station, KDKA, which also claimed a loss in its groundwave service area of 3,242,000 listeners. Since this service would remain intact under the Commission's present proposal, it is highly unlikely that the listeners deprived of WAMP's service, whatever their number, will lose touch with Greater Pittsburgh entirely. We do not pretend to judge the comparative merits of WAMP and

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12 The losses on regional channels may be tabulated as follows:

Station	*Service Loss*
WREC	367,000
WKY	303,000
WBC	191,000
WWDC	139,000
WMAK	54,000
WISH	300,000
WAMP	885,000
WRBL	25,000
Total	2,264,000

KDKA, or indeed whatever other radio services are available in the Greater Pittsburgh region. We only point to the WAMP case as supporting our conclusion that the Commission was not arbitrary in refusing to rely on an earlier headcount whose relevance to the present proposal was so limited.

An additional consideration justified the Commission's refusal to attempt to quantify the relevant losses and further undermines the asserted cogency of its earlier figures. The earlier calculations were based upon two series of technical data. One series calculated losses on the basis of curves that represented true nighttime propagation conditions, which have been established in the agency's rules. 47 C. F. R. §73.90 (1967). In the Further Notice in the present proceeding, however, the Commission announced that it did not believe that these curves accurately reflected the extent of interference occurring during the presunrise transitional period. To avoid the burden of developing a new set of standards, which would require collection and analysis of a great volume of statistical data, the Commission proposed to apply a set of standards it had developed in an earlier proceeding, *Daytime Skywave Transmissions,* 18 R. R. 1845 (1959). These guidelines, however, were based upon data measuring interference during the transitional period *after sunset,* and comments attacked their validity on the ground that they did not accurately reflect conditions obtaining *before sunrise.* The Commission was thus persuaded that it could not conscientiously proceed along the lines it had contemplated, and that an attempt to collect and digest new data would unduly protract an already lengthy proceeding.

The fulltimers contend that in the absence of other satisfactory data, the Commission was bound to apply the strict

nighttime standards announced in its Rules to calculate the amount of injury they would be caused even though these would overstate the case. We do not see why. *Hall* v. *F. C. C.*, 237 F. 2d 567 (D. C. Cir. 1956), on which they rely, does not stand for this proposition. There the Commission claimed the right to depart from its technical standards in a television licensing proceeding even though it conceded that these were accurate to a high degree of probability. The court held that, given this concession, the agency was obliged to demonstrate that what was highly probable was not in fact the case. Compare *National Broadcasting Co.* v. *F. C. C.*, 362 F. 2d 946, 957 (D. C. Cir. 1966). Here, on the other hand, even the petitioners agree that strict nighttime standards are unreliable. Moreover, the fulltimers were alerted by the Commission's Further Notice of 1962 that the technical issue was to be canvassed. Yet it was only in July 1966 that the Association for Broadcasting Standards submitted a fragmentary study on presunrise propagation conditions. The Commission was fully justified in refusing to consider that this late submission required it to undertake a lengthy full scale inquiry at that time. Compare *W. S. Butterfield Theatres* v. *F. C. C.*, 237 F. 2d 552 (D. C. Cir. 1956).

It is true, of course, that the Commission is not limited to the evidence submitted by the parties and is obliged to make those determinations which are necessary to satisfy it that the public's interest will be served. But under the circumstances we have described, we cannot say that the Commission's decision to proceed without precise figures whose compilation might take years was arbitrary or capricious. Compare *Television Corp. of Michigan, Inc.* v. *F. C. C.*, 294 F. 2d 730 (D. C. Cir. 1961).

Our conclusion is buttressed by the fact that the Commission's present decision did take the fulltimers' interests

into account in several salient respects. Not only were the Class I stations carefully protected, but daytimers of both classes were forbidden to broadcast during the period before 6 A.M., when true night time conditions were more closely approximated. Moreover, all presunrise operations on the regional channels were limited to a maximum of 500 watts power, one tenth that generally used by many of the important daytimers, so that, as the Commission found, the proposed rules "may well *improve* present interference conditions" in many areas. While the fulltimers deny that the power limitation will be of much importance and point to the Commission's statement in 1959 "that power reduction poses only an extremely limited potential for alleviating the interference problem," 27 F. C. C. at 58, it is clear, when this statement is read in context, that the agency was there concerned with the peculiar susceptibility of skywave service to interference and was not saying that power reduction would not reduce interference with the groundwave.

The fulltimers' other claim, that the Commission was obliged to quantify the number of listeners who would gain from its decision, is weaker than the one we have just rejected. The Commission found that the daytimers had demonstrated a real need for relatively early broadcasts of school closings, traffic conditions and weather reports in the areas they served. It also found that 61% of the communities in which the daytimers were located did not have a fulltimer either in the town itself or in its "urbanized area," and that it would cause too many administrative difficulties to exclude the other daytimers from the dispensation, when, in any event, they would be performing important services —indeed, services, in some cases, on which listeners had relied for years. Moreover, a limited engineering study had given it cause to believe that the interference the addi-

tional stations would cause would "not necessarily be great."

The fulltimers question this determination of need by citing the Commission's 1959 finding that of the 912 communities in which a daytimer, but not a fulltimer, was then located, "357, or 39.1 percent, with a population total of 1,761,622 do not receive nighttime groundwave service from any stations; that 218, or 23.9 percent, with a population total of 1,684,026 receive nighttime groundwave service from one station; that 337, or 37 percent, with a population total of 5,218,854 receive nighttime groundwave service from two or more stations; and that many of the communities are nearby suburbs of well-served metropolitan areas." *Id.* at 57. These figures are to a considerable extent incommensurable with the figure given in the present decision since the 61% does not include those communities receiving groundwave signals from within their urbanized areas and includes only those localities served by Class III daytimers. They are also obsolescent—in 1958 there were only 1400 daytimers. compared with 2190 today. See *Daytime Standard Broadcast Stations,* 18 R. R. 1689, 1692 (1959). Moreover, it is clear that the Commission had a firm grasp as to the order of magnitude of the listeners gaining services and the fulltimers are using the older figures simply to challenge the agency's order of priorities. As the history of presunrise regulation demonstrates better than anything else, both daytimer and fulltimer have legitimate claims to the use of the AM band during the transitional hours and we cannot fault the Commission for believing a compromise between these competing claims constitutes the best solution. If experience should show the particular compromise here adopted to be less beneficial than the Commission believes, the road to change is always open.

Sections 303(f) and 307

As a part of their substantiv attack the fulltimers seek to invoke two statutory provisions. They argue that §303(f)'s[13] command that the Commission "make such regulations . . . as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter" permits it to make a decision increasing interference only when this step is justified by one of the other specific provisions of the Act. However this may be, we find that §303(c),[14] giving the Commission the power to "assign bands of frequencies to the various classes of stations" and to set each station's starting time gives the Commission ample authority to proceed as it has done. There is even less appeal in the claim based on the general provision of §307(b)[15] requiring the Commission to distribute licenses so as to provide "a fair, efficient, and equitable distribution" of radio service to the various parts of the nation. That is precisely what the Commission has

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13 "(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;".

14 "(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;".

15 "(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

endeavored to accomplish. There is equally little force in the complaint of the daytimers and the limited fulltimers who are being obliged to cut back their presunrise operations that §307(b) has been violated. We cannot find that the agency's conclusion that a limited presunrise service distributed widely throughout the nation is more "equitable" than a more generous dispensation limited to an ever diminishing number of localities is irrational.

The Agreement with Canada

Both groups of petitioners challenge the merits of the decision on another ground. The Commission found that at least half of the presunrise operations permitted under the old rule violated our undertakings to Canada in the North American Regional Broadcasting Agreement (NARBA), ratified by the Senate in 1960, which guaranteed that American radiation would not interfere unduly with Canadian stations. See Annex 2, §c and Appendix B, 11 U. S. T. & O. I. A. 415 (1960). It also concluded that any scheme permitting substantial amounts of presunrise broadcasting by daytimers would lead to wholesale NARBA violations. Consequently, before the F. C. C. reached its decision, the United States concluded a bilateral agreement[16] with Canada enunciating standards consistent with the Commission's ultimate disposition in this proceeding.

16 The relevant parts of the Agreement read:

"Pursuant to Section A, Subsection 6, of Annex 2 of the North American Regional Broadcasting Agreement, [1] the Governments of the United States of America and Canada agree to permit, bilaterally, certain AM broadcasting stations to operate for a limited period of time prior to local sunrise, at least during the winter months, using all or part of their authorized daytime facilities in accordance with the criteria as set forth below:

"Program transmission by standard broadcast stations with authorized daytime facilities from 6:00 a.m. local standard time to local

The fulltimers read the present decision as finding in this recent Agreement the principal justification for its new rules, and contend that, if the Agreement was invalid, the rest of the structure must fall. We do not so read the decision. The Commission specifically explained, in its Memorandum Denying Reconsideration, that it initiated the Canadian talks only after reaching its tentative conclusions, and we have held that the rest of its analysis is sufficient to support its present course.

We also find no merit in the claim that the Agreement violates NARBA and has not been ratified by the Senate.

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sunrise (pre-sunrise operation) will be permitted subject to the following provisions:

"The privilege of pre-sunrise operation would not extend to:

(1) Class I stations.

(2) Class II stations operating on Clear Channels on which the other country had a Class I-A priority.

(3) Class IV stations operating on Local Channels authorized for operation with daytime power in excess of 250 watts.

"Class II stations other than as noted in (2) above to be permitted pre-sunrise operation in relation to other Class II stations in accordance with the provisions for Class III stations, where such stations:

(1) afford NARBA night time protection to the 0.5 mv/m 50 per cent skywave contour of any co-channel Class I-B station in the other country, or

(2) are located west of the co-channel Class I-B station(s) in the other country and begin no earlier than sunrise at the location of the western-most Class I-B station located east of the Class II station."

* * * * *

"Proposed pre-sunrise operations may be presumed to be acceptable if they are within the provisions set out in this understanding. However, each proposal shall be notified directly between the Federal Communications Commission of the United States and the Department of Transport of Canada and within sixty days of receipt of a proposal the recipient agency may object thereto. The notification shall include the exact operating characteristics of each station permitted to operate with authorized (or reduced) daytime facilities during pre-sunrise hours."

The fulltimers point to the restrictions on night operation and to the definition in Annex 2 of NARBA:

> 6. *Daytime and Night-time Operation*
>
> (a) Daytime operation in general means operation between the times of local sunrise and local sunset at the transmitter location of the station; however, in particular cases other hours for daytime operation may be established, either in the present Agreement or in bilateral agreements, between the respective Contracting Governments, taking into account the location of the station it is intended to protect.

The Canadian Agreement permitting limited presunrise operation, it is argued, does not fall within the proviso because rather than dealing with "particular cases," it enumerates entire classes of stations whose operations would be permitted. We see no force in this argument. If Canada was willing to permit a large number of stations to operate presunrise, surely it was entitled to say so in a coherent fashion rather than approve each one as proposed. Moreover, the recent Agreement does not unequivocally grant permission to entire classes of stations—rather, each Government reserves the right to object to a particular operation within sixty days after it has been notified of its existence. Our view is further supported by §G of NARBA which provides that:

> Contracting Governments may settle their differences on questions relating to the interpretation or execution of this Agreement through diplomatic channels or by any other method mutually agreed upon . . . .

In fact, the successful conclusion of the Canadian Agreement powerfully supports the Commission's solution—for the first time presunrise operations have been placed on a basis consistent with our international obligations.

Paradoxically, the daytimers and restricted nighttimers join in their brothers' attack on the new Agreement. However, we do not understand how the liberalization of NARBA can even be claimed to have affected their interests adversely. The contentions of two stations require special mention: KMMJ, a Class II daytimer in Grand Island, Nebraska, has begun full daytime operations at the time the sun rose in Atlanta, Georgia, the site of the dominant Class I-A station on its channel. In its Further Notice, the Commission indicated that, as its proposal then stood, stations in KMMJ's position could continue signing on as in the past. Thus assured, KMMJ did not file a comment in the proceeding, and claims the public notice provisions of §4 of the APA protect it against that aspect of the Commission's decision which permits Class II stations like KMMJ to begin broadcasting only at 6 A.M., despite the fact that the sun rises as early as 5:15 A.M. in Atlanta. The Canadian Agreement enters the picture because of the Commission's response that the uniform 6 A.M. starting time is mandated in the Canadian Agreement and KMMJ had no right to notice since §4 of the APA does not apply to agency proposals insofar as they involve a "foreign affairs function." §4(a)(1). While this response seems dubious since the Canadian Agreement does not explicitly prohibit daytime operations before 6 A.M. but simply permits post-6 A.M. operations under standards more liberal than those in NARBA, we find KMMJ's claim defective on another ground. The Commission made clear that it did not intend to limit the proceeding to consideration of its

own proposal, but that what was involved was "a basic policy judgment as to the terms and circumstances under which an extension of daytime only operation would be permitted." King's Garden Inc., the licensee of a Class III daytime station, KGDN, located in Edmonds, Washington, complains that, under the new rules, it will be permitted to broadcast before sunrise only subject to a power limitation of 58 watts, required by the new Agreement with Canada and that it was not notified of the agency's intention to negotiate a new agreement. But here the Commission is on firm ground in suggesting that the "foreign affairs" exception to the APA applies. Moreover, KGDN has no cause for complaint since the NARBA standards would have been even more severe.[17]

Challenges on Procedural Grounds

Both groups of petitioners make fundamental challenges to the procedural aspects of the present proceeding. They argue, from their different vantage points, that the Commission had no right to depart from the status quo in a rule making proceeding based upon the general characteristics of broad classes of radio stations. Instead, they contend, before the Commission could increase interference (in the case of the fulltimers) or limit a station's power and time of operation (in the case of daytimers and restricted nighttimers formerly operating under Rule 73.87), the Act requires it to conduct a multitude of evidentiary

17 KGDN also states it relied on the Further Notice's promise that daytimers, otherwise ineligible because located in an urbanized area containing a fulltimer, would be entitled to operate presunrise upon a showing of unusual circumstances and argues that if this promise had been kept, it would have been eligible because of its distinctive religious programming. But it was only by misreading the Notice that King's Garden could have been mislead. The Notice did not promise that daytimers, on any showing, could begin before 6 A.M.

hearings in which the particularized conflicts between daytimer and fulltimer are analyzed.

The Commission rejected this approach not only because of the enormous number of hearings that would be required but also because as the skywave signal of a given daytimer often interferes with the signal of more than one fulltimer and vice versa, such proceedings would be complex multiparty affairs, which could well demand elaborate inquiry into the comparative merits of competing applicants for presunrise authority. Given its past unhappy experience, the Commission was on solid ground, as a matter of good sense, in concluding that "a more particularized approach . . . would [not] throw significantly more light on the appropriate course of action in a given situation, anything like enough to warrant the burden involved." Moreover, pursuing the course the petitioners suggest would indefinitely prolong an allocation scheme in blatant disregard of our international obligations. Neither daytimers nor fulltimers seriously suggest the Commission has mistaken the consequences of pursuing the case by case approach. Their argument is rather that, despite the seemingly broad rulemaking power confided by §303(r),[18] Congress has required the agency to conduct such individual hearings even if the administrative heavens fall. Their contentions sharply pose the issue whether provisions for general rule making by administrative agencies are to be applied in their apparent breadth or are limited by other statutory provisions seemingly framed to deal with the different problem of indi-

18 "(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

vidual applications. In resolving the conflict it is well to remember that Congress could hardly have intended to deprive administrative agencies of ability to administer. See *Permian Basin Area Rate Cases*, 36 U. S. L. W. 4337, 4344 (U. S. May 1, 1968).

The fulltimers first contend that §316, dealing with modification of licenses,[19] requires separate evidentiary hearings where as here the Commission's rule is to take effect immediately, resulting in increased interference during the life of their present licenses. But no case cited to us has held that §316 thus disables the agency in the exercise of its rule-making powers. Rather, in the only decision in point, the Ninth Circuit upheld the Commission's modification of existing license rights by rule, declaring that §316's "primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee." *California Citizens Band Association* v. *United States*, 375 F. 2d 43 (1967), cert. denied, 389 U. S. 844 (1967). The decision draws the proper line. Adjudicatory hearings serve an important function when the agency

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19 "Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them. See 1 Davis, Administrative Law Treatise §6.13 at p. 147 (1965 pocket part) and §7.01.

The case law has been moving in this direction. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), held that despite the fact that what was then §309(b) of the Act required a "full hearing" before a license application could be rejected, the Commission could summarily dismiss applications violating the Commission's "concentration of ownership" rules—subject only to conformance with provisions of the Commission's regulations allowing an applicant to seek a waiver of, or exception to, any rule. The Court reaffirmed the principle of the *Storer* case in *FPC* v. *Texaco Inc.*, 377 U. S. 33 (1964). We have sustained a rule modifying all existing licenses despite a statute requiring an evidentiary hearing for modification of a particular license, *Air Line Pilots Ass'n* v. *Quesada*, 276 F. 2d 892 (1960), as has the District of Columbia Circuit in *American Airlines* v. *CAB*, 359 F. 2d 624, 628-29 (*in banc*), cert. denied, 385 U. S. 843 (1966). Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

We see no reason why the principle of these cases should not apply here. The Commission's present rules contain a provision for waiver, 47 C. F. R. §1.3, similar to those relied on in the *Storer* and *Texaco* cases; we have no reason to doubt that if a particular fulltimer should be able to make a preliminary showing that presunrise authorization to a daytimer or limited nighttimer would

cause a degree of harm not contemplated in the rule making, the Commission would hear him. As said by Judge Leventhal in the *American Airlines* case, *supra,* although "the present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases," the principle there established "is not to be revised or reshaped by reference to fortuitous circumstances" but rests "on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest."

The fulltimers urge that however all this might otherwise be, *F. C. C.* v. *National Broadcasting Co. (KOA),* 319 U. S. 239 (1943), requires a different result. But the case is in no way inconsistent with the position we have taken. While the Supreme Court there held that a license is "modified" within the meaning of the statute whenever the Commission permits additional interference on the licensee's channel, the Court did not decide that a license can be modified only after an adjudicatory hearing as contrasted with rule making. The facts of the case did not present that question. WHDH had applied for a modification of its license under §309(a) to permit it to broadcast at night on the same channel as KOA in violation of the Commission's general rules, and KOA sought to intervene in the evidentiary hearing not only to present its argument on the general question of Clear Channel allocation that the proposed grant presented but also to argue that "the service of WHDH, while interfering at night with that of KOA, would not be a service equally useful," *Id.* at 244, and all agreed that an evidentiary hearing should

be held to determine the merits on that issue. The Court decided only that when an adjudicatory hearing on an individual application was thus necessary, a licensee who would be aggrieved by the grant had the right to participate in it. This is a long way from saying that such a licensee has a right to an adjudicatory hearing when the Commission justifiably determines that a rule-making proceeding in which the licensee has participated has revealed that such a hearing would serve no useful purpose. See *Logansport Broadcasting Corp.* v. *U. S.*, 210 F. 2d 24 (D. C. Cir. 1954).

Two decisions of the District of Columbia Circuit, on which the fulltimers strongly rely, also do not bear the weight that is placed upon them. *Transcontinent Television Co.* v. *F. C. C.*, 308 F. 2d 339 (D. C. Cir. 1962), dealt with a "rule-making" proceeding deciding whether one VHF television station (Channel 10) in Bakersfield, California should be deprived of its channel so that the city could be given two UHF channels. The Commission, however, did not attempt to modify Channel 10's license, making the new rule applicable only on its expiration. As the issue involved a particular situation, the Court, in dicta, properly stated that the rule-making proceeding would not have been sufficient if Channel 10's present license had been modified. The rule-making proceeding in *Goodwill Stations* v. *F. C. C.*, 325 F. 2d 637 (D. C. Cir. 1963), was more general in scope. There, the Commission concluded that a second nighttime station should be assigned to each of 13 "Clear Channels," but once again the agency singled out the 13 stations from their brothers on basis of an individualized study of their particular characteristics. *Id.* at 640. As the Commission refused to put its new rules into effect during the life of the fulltimers' licenses, the court was not

obliged to rule on the question before us. We need not decide whether the Commission's course of action in *Goodwill Stations* was dictated by statute—as the court's opinion assumes—or prudence: it is enough to note the distance between that case and the instant one.[20]

While these considerations also meet the §316 claim of the daytimers and restricted fulltimers, an additional consideration bars them as well. The statute requires a hearing only when a station license is modified. But the licenses held by these petitioners only permit daytime broadcasting at local sunrise, not before. Indeed, in passing on their license applications on a case by case basis, the Commission never considered whether their presunrise operations were in the public interest. Nor did the Commission implicitly make such a finding by permitting these stations to operate under old rule 73.87. *Music Broadcasting Co.* v. *F. C. C.*, 217 F. 2d 339 (D. C. Cir. 1964), delineates the limited compass of the rights granted by the rule. An ingenious daytimer argued that since the rule proscribed only that "interference" which was "undue," the Commission was obliged to conduct an evidentiary hearing to determine that its service did not better promote the public interest than the service with which it interfered, before it could be terminated. Otherwise, it argued, the Commission could not be said to have found that it interfered "unduly" with the signal of the dominant station. The Court rejected the argument and held that the rule did not grant the right to challenge the standards the Commission had developed in its administration. The daytimer was limited to a hearing on whether it caused objectionable

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20 *Zenith Radio Corp.* v. *F. C. C.*, 211 F. 2d 629 (D. C. Cir. 1954), also cited by petitioners, is not in point. There, the appellant's right to an evidentiary hearing was conceded, and the Court simply decided that failure to participate in a more general rule-making proceeding did not constitute a waiver.

interference, as the Commission had defined the term, and then only after the offending broadcasts had been summarily terminated. Here, the Commission has redefined by rule what interference was objectionable, basing its new definition on a broader view of the problem. Consequently, this group of petitioners has not been deprived of a "right" the regulations generally granted, as was the case in KOA.

Both groups of petitioners next point to the proviso to §303(f) as establishing their right to an evidentiary hearing. The history of the statute suggests that this was not intended to accomplish anything more than to secure the rights granted by §316 as it now stands. When the hearing proviso of §303(f) was added in 1934 as part of the general revision of the Radio Act of 1927, what is now §316 did not grant a station whose license was modified an evidentiary hearing in any case—instead the Commission was only obliged to grant the aggrieved licensee "a reasonable opportunity to show cause why such an order of modification should not issue." §312(b), 48 Stat. 1065, 1087, 73d Cong. 2d Sess. (1934). As the legislative history indicates, Congress intended §303(f) to remedy this defect by vaguely mandating a "public hearing" in certain limited areas.[21] Since what is now §316, added to the statute in 1952, 66 Stat. 717, is both more ample and more explicit, it would be paradoxical to construe the earlier "public hearing" requirement as requiring an evidentiary hearing in cases where §316 does not.

We need not decide this, however, since both groups of petitioners fail on other grounds to qualify for whatever

21 The hearing proviso to §303(f) was part of a bill that first passed the 72d Congress, only to be vetoed by President Hoover. It was proposed because "[n]o hearing is required by existing law." S. Rep. 1045, 72d Cong., 2d Sess. 9 (1933).

relief §303(f) affords. The fulltimers cannot bring themselves within the language of the proviso, since the FCC has not made any changes in their frequencies, authorized power or time of operation. They attempt to expand the statute beyond its language by arguing that if Congress required a hearing before a station's "power" could be changed, it would be inconsistent to hold that it would not have required one before a station's "effective power" was reduced by permitting additional interference. Whatever merit this argument would have standing alone, its force is undermined by the Supreme Court's construction of §316 in the *KOA* case, which accomplished just this result, within the limits we have marked. There is thus no compelling reason to expand §303(f) beyond its terms.

The complaining daytimers and restricted fulltimers are in a different position with regard to §303(f) as their "power" and "times of operation" have in fact been limited. But, as we have shown, this group of stations never had an unfettered right to operate at daytime power before sunrise. Since under the old rule these stations did not even have the right to demand an evidentiary hearing to challenge whether the limitations the Commission set upon their operation were in the public interest, we do not understand how §303(f) can be thought to protect them.

The fulltimers' final procedural challenge is that the provisions of the Rule, §73.99(c), whereby Presunrise Service Authorizations (PSA's) are to issue to eligible stations merely upon a showing of certain basic technical data, run counter to the scheme of §§308 and 309 whereby, generally speaking, the FCC can grant or modify a license only upon a finding of public interest and—most importantly—after a lapse of 30 days following public notice of filing, during which period "any party in interest" may file "a petition to

deny," §309(d).[22] The Commission may dismiss such a petition without hearing if it finds "on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact" and that grant of the application would be in the public interest; otherwise it must set the application for a license or license modification for evidentiary hearing in the manner provided in §309(e).

The Commission thought that compliance with these procedures was unnecessary in the case of PSA's because of the exception in §309(c)(2)(A) relating to "a minor change in the facilities of an authorized station." We agree.

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22 "(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

"(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (c)."

Presunrise authorizations are accorded only to persons who have already obtained licenses under §309, in proceedings in which their general capacities and the effects of their operations were scrutinized, and the PSA's are less extensive as to time of operation than what many of these licensees had been permitted under rule 73.87. Equally important, the new rules take into account the interests of the only fulltimers for whom §309(d) guarantees have a real point. The regulations provide that a PSA "is secondary to the basic instrument of authorization and may be suspended, modified, or withdrawn by the Commission without prior notice or right to hearing, if necessary to resolve interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action," §73.99(f). Consequently, in the rare case where a fulltimer can show that a PSA is producing results not contemplated by the present decision, for example, by depriving a large number of listeners of all AM radio service in the name of providing a smaller number of listeners with local service, relief is available. See also 47 C. F. R. §1.3. Cf. *Permian Basin Area Rate Cases, supra,* at 4343. In all other cases, compliance with §309(d) would be a useless formality anyway, since the present decision itself—surely a matter the Commission "may officially notice"—would show that there were "no substantial and material questions of fact" and that a grant of the application would be in the public interest, and no hearing would be required.

Alternatively we believe the analysis previously made with respect to §316 applies to §309 as well. Indeed, when the petition to deny is filed by a licensee, the §309(d) procedure is largely a method for effectively implementing §316 rights. The legislative history, see H.R. Rep. No. 1800, 86th Cong. 2d Sess., 2 U. S. Code & Adm. News 3516, shows

that §309(d) was an attempt to provide a workable method whereby persons affected by an individual application for a license or its modification were to have notice and a reasonable period for registering their objections without, however, requiring the FCC to hold a hearing in every case where a petition to deny was filed. Nothing in the text or in the history indicates that the statute was addressed to the entirely different situation where, after proceeding under §4 of the APA, the Commission utilizes the rule-making power granted by §303(r) to alter the permissible times of operation by existing licensees, particularly since, as indicated above, compliance with §309(d) after such a rule-making proceeding would generally be an exercise in futility.[23]

Complaints of Daytimers as to Refusals of Waivers

The last point requiring discussion is this: Certain daytimers, notably KXXX, a Class III station broadcasting daytime at 5000 watts power from Colby, Kansas and serving a wide rural area in four of the Plains States, protest the Commission's refusal to waive the application of the new rules so as to grant expanded presunrise privileges to those stations providing distinctive programming to rural areas which have few alternative services available. In addition to citing the administrative burden this would entail, the Commission justified its refusal both because it was reluctant to base its waiver decisions on its programming preferences, which it feared would be "highly subjective . . . and of doubtful validity," and because in the long run, decisions based on programming would be under-

23 *Interstate Broadcasting Co. v. F. C. C.*, 323 F. 2d 797 (D. C. Cir. 1963), is not to the contrary. The applications were clearly within §309 and the rule relied on by the FCC to prevent WQXR's presentation of evidence had been framed merely on technical criteria.

mined by ownership changes, obliging the Commission repeatedly to review decisions made on subjective grounds in the first place. While in certain instances, the Commission may even have the duty to use programming criteria in its decision to grant or withhold a license, *Office of Communication of United Church of Christ* v. *F. C. C.*, 359 F. 2d 994 (D. C. Cir. 1966); see also §315; we appreciate the Commission's reluctance to enter the area where it is not compelled to do so; we can understand also why the Commission would be reluctant to grant waivers until there had been a reasonable opportunity to explore the working of its new Rule. Moreover, insofar as the daytimers are correct in their claim that the areas they serve are without alternative services, the Commission has taken a significant step to meet their complaint. For it has announced that power may be increased above 500 watts during the pre-dawn period beginning at 6 A.M., upon a showing that this will not interfere with the signal of any dominant co-channel station, based on the Commission's strict nighttime standards. Since these standards were also used in interference hearings held under old rule 73.87, *Reese Broadcasting Corp.*, 20 R. R. 1136 (1960), the daytimers cannot fairly complain of their severity. The Commission has announced also that it will approach the Canadian authorities with a view to obtaining an agreement permitting presunrise operations from 6 A.M. local time, rather than 6 A.M. standard time, further improving the daytimers' position. The combined effect of these modifications will be to reduce the daytimers' complaint to the single fact of restriction against operation before 6 A.M. in the portions of the year when sunrise does not occur until later and when such operations could be conducted without breach of our international obligations or harmful

effect on other stations. We shall expect the Commission, after a suitable trial period has passed, to approach such waiver applications in a manner consistent with its duties under the Act. Cf. *Permian Basin Area Rate Cases, supra,* at 4343.

The petitions to review are denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 368

ASSOCIATION ON BROADCASTING STANDARDS, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 369

THE KING'S GARDEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 390

WBEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 119-159) is not yet reported. The Commission's report and order (Pet. App. 1-58) is reported at 8 F.C.C. 2d 698; its memorandum opinion and order denying reconsideration (Pet. App. 61-118) is reported at 10 F.C.C. 2d 283.

JURISDICTION

The judgments of the court of appeals (Pet. App. 118A-118B) were entered on May 10, 1968. The petions in Nos. 368 and 369 were filed on August 2, 1968, and the petition in No. 390 was filed on August 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether separate adjudicatory hearings are required by the Communications Act before the Commission may validly adopt a general change in the rule relating to the presunrise operation of large classes of standard broadcast (AM) radio stations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151-609) and of the Commission's Rules and Regulations are printed in the various petitions.

STATEMENT

These cases involve the Commission's revised rule governing presunrise operation by daytime-only radio stations and by fulltime radio stations whose licenses require them to operate with less power and/or different antenna patterns during nighttime. During daytime hours, only the groundwave signals of AM stations are of consequence, because that part of a station's signal which is directed upward (the skywave signal) is dissipated and lost. However, at night the skywave signals are reflected back to earth by the ionosphere, beyond the useful reach of the groundwave signal and often at great distances from the originating station. Skywave signals, whose intensity diminishes gradually from about two hours prior to sunrise to two hours after sunrise, provide a useful service, although they are not as reliable as the groundwave signal. Skywave signals also cause additional electrical interference at night not present during the daytime. The presence and peculiar characteristics of skywave signals reduce sharply the number of stations which can operate in the standard broadcast band at night without causing an undue amount of interference (see Pet. App. 123).

For these reasons, many commercial radio stations are either licensed for daytime operation only or are required to reduce power or change their antenna patterns at night, or both, to minimize nighttime interference problems. About half the total number of some 4200 AM stations are daytime-only stations.[1]

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[1] The court below noted that the overwhelming number of Class II stations are daytime only, that of the 858 Class III

Since there is a need for presunrise local broadcasts relating to matters such as traffic conditions, school closings and weather reports (see Pet. App. 139), the Commission's rules have, since 1941, permitted certain classes of AM stations to commence operation with their daytime modes of operation at 4:00 a.m., local standard time, although the Commission reserved the right to terminate such operation where fulltime stations on the same frequencies demonstrated that their authorized nighttime service was unduly interfered with (47 C.F.R. 73.87; Pet. App. 125, n. 3). In taking this approach, the Commission attempted to balance the competing public interest considerations in the availability of local presunrise broadcasts and in avoiding destructive interference between stations. The accommodation of these interests embodied in the Commission's rules was satisfactory until the proliferation of new AM stations (particularly daytime-only stations) following the end of World War II provoked increasing complaints of interference by fulltime stations. This resulted more and more often in termination of the interfering presunrise operations, to the disadvantage of the station and its listening public. Moreover, in 1960, a revised version of the North American Regional Broadcasting Agreement (NARBA) went into effect. The treaty made it clear that at least half of the existing presunrise operations

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stations permitted to operate at night, only 90 use the same power and antenna patterns day and night, and that another 1200 Class III stations are restricted to daytime-only operation (Pet. App. 124-125). Class II stations are secondary stations on clear channels; Class III stations are on regional channels. Class II and Class III stations are primarily involved in these cases.

were in violation of our government's international commitments (Pet. App. 127).[2]

In response to the increasing difficulties in the administration of its 1941 rule,[3] the Commission instituted a new rule-making proceeding on December 8, 1961 (26 Fed. Reg. 11911), as amended by a further notice on November 30, 1962 (27 Fed. Reg. 12063), looking toward revision of the approach toward presunrise operation. On July 13, 1967, after consideration of voluminous comments, the Commission released its report and order (8 F.C.C. 2d 698; Pet. App. 1-58) adopting a new Section 73.99 (Pet. App. 49), under which, as a general matter, presunrise operation beyond the normal license terms of affected stations may begin at 6 A.M., local standard time, with power not in excess of 500 watts.

In setting out the basic considerations which led it to this result, the Commission stated (Pet. App. 31-32):

> [T]he resolution of this proceeding necessarily represents a balance between considerations and

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[2] The Commission is authorized by law to promulgate rules and regulations to carry out treaties relating to radio to which the United States is a party (47 U.S.C. 303(r)).

[3] The number of AM stations increased from 882 in 1941 to the present 4200 plus, and the number of daytime-only stations grew from 60 to 2180 at the time of the decision below (Pet. App. 126-127). In 1958 and again in 1959, the Commission had studied possible revision of the presunrise rule, and determined that extended hours of operation for daytime-only stations without some power decreases would lead to extensive increases in interference. *Daytime Standard Broadcast Stations*, 17 Pike & Fischer R.R. 1669 (1958); *Extended Hours for Daytime Operation*, 27 F.C.C. 53, 18 Pike & Fischer R.R. 1689 (1959).

objectives which are to some degree in conflict—the provision for needed pre-sunrise service on the one hand, particularly in situations where it has been in existence before and has come to be relied upon by listeners, and on the other hand, protection of the existing service of unlimited-time stations against an inordinate amount of loss through interference and thus inefficient use of the channels involved. It is also apparent, as it has been for some time, that pre-sunrise use of daytime facilities by United States stations must be brought into line with this country's obligations, under pertinent international agreements, to protect the stations of other nations in the North American Region from objectionable interference. With respect to the regional channels, we are persuaded, after careful consideration of the record herein and the above considerations, that the most appropriate balance can be achieved by permitting virtually all [of these] stations (daytime and fulltime) to operate pre-sunrise, from 6 a.m. standard time on, with 500-watts power, using their daytime modes of operation (directional or nondirectional), except where lesser power is required to meet international obligations as mentioned above.

While recognizing that the new regulations would affect the prevailing practices of many stations, the Commission found that the practicalities of the situation precluded a station-by-station approach, stating (Pet. App. 41-42):

> We must reject the arguments * * * that a case-by-case approach must be used in this matter. Such an approach—taking into account that there are some 1,200 daytimers and 858 fulltime

> Class III stations—is simply out of the question from an administrative standpoint. The number of potential hearings involved staggers the imagination, and they would in all probability become exceedingly complex, since (with skywave interference involved) more than one daytimer usually affects a given fulltimer and, conversely, a given daytimer may affect more than one fulltimer. A given hearing situation might well end up involving a considerable number of the stations on a channel, including a comparative inquiry into which pre-sunrise operation should be permitted and which precluded. Not only would this entail an inconceivable burden, both on the Commission and on standard broadcast stations and their advisers, it would take a great amount of time, a consideration inconsistent with our view that the public interest clearly requires a reasonably prompt resolution of the "pre-sunrise" situation and the widespread uncertainties currently involved in it. We do not conceive that a more particularized approach, either by hearing or otherwise, would throw significantly more light on the appropriate course of action in a given situation, anything like enough to warrant the burden involved.

Reconsideration of the newly promulgated rule was denied by the Commission's memorandum opinion and order released October 17, 1967 (10 F.C.C. 2d 283; Pet. App. 61-118).

Upon appeals by fulltime stations objecting to the interference they would receive from presunrise operations under the new rule and by daytime stations and limited fulltime stations objecting to the limitations upon their presunrise operation, the court below

unanimously upheld the Commission's action. It held, *inter alia*, that the new rules ~~were~~ was based upon an adequate analysis of relevant factors (Pet. App. 132-140); that the Commission was not required to take into account the precise numbers of listeners who would gain and lose service (*ibid.*); and that the Commission had reasonably discharged its duty to make such regulations as it deems necessary to prevent interference and to carry out the provisions of the Act (47 U.S.C. 303(f), 303(r)) and to make a "fair, efficient, and equitable distribution of service" (47 U.S.C. 307(b)) (Pet. App. 141-142). The court held further that the Commission properly proceeded "in a rule making proceeding based upon the general characteristics of broad classes of radio stations" rather than in a "multitude of evidentiary hearings in which the particularized conflicts between daytimer and full-timer are analyzed" (Pet. App. 146-157). It found no conflict in this regard with either Section 316(a) of the Communications Act (47 U.S.C. 316(a)), which provides for an opportunity "to show cause by public hearing" why a license should not be modified, or with this Court's decision in *Federal Communications Commission* v. *National Broadcasting Co.* (*KOA*), 319 U.S. 239.[4]

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[4] The court below also noted (Pet. App. 157-159) that requests for waivers to permit expanded presunrise operation based upon claims of distinctive programming were properly to be considered on an *ad hoc* basis after some experience had been gained under the new rule.

ARGUMENT

The presunrise rule here attacked was adopted by the Commission following a rule-making proceeding in which extensive comments of interested parties were considered. Petitioners assert that the new rule will affect the operations of many existing stations, either by exposing them to increased interference (petitioner in No. 390) or by reducing the scope of their present presunrise operations (petitioners in Nos. 368 and 369). They argue, in substance, that all affected stations were entitled to individual adjudicatory hearings before such changes could be made, and that the Commission was precluded from proceeding by general rule.

The court below concluded that the Commission's broad rule-making powers[5] were properly invoked to resolve the problems presented by increasing presunrise operation and to ensure compliance with pertinent treaty restrictions, and that individual adjudicatory proceedings in these circumstances were neither

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[5] 47 U.S.C. 303(r) provides that the agency may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." Section 303 also authorizes the Commission by rule to classify radio stations (303(a)), prescribe the nature of the service to be rendered (303(b)), assign frequencies and regulate power (303(c)), regulate the apparatus to be used with respect to its external effects (303(e)), and establish zones or areas to be served by any station (303(h)). See also 47 U.S.C. 154(i).

feasible nor required by statute. The decision below is clearly correct, and conflicts with no decision of this Court or of another court of appeals. Accordingly, further review is not warranted.

1. It is well established that administrative agencies have authority to adopt and apply general rules applicable to a broad class of persons subject to their jurisdiction without conducting separate adjudicatory proceedings for each person affected, even where the regulatory statute requires a hearing before individual licenses or certificates may be modified. *E.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33. In *Storer*, for example, this Court held that the statutory right to a hearing before denial of an application for a broadcast license did not prevent the Commission from promulgating general standards relating to multiple ownership by rule and summarily disposing of applications of persons ineligible under the rule.

While the specific rule at issue in *Storer* concerned the treatment of future license applications, the principle of that decision has been applied to situations, like that in the instant case, involving the effective modification by general rule of existing licenses. *California Citizens Band Association* v. *United States*, 375 F.2d 43 (C.A. 9), certiorari denied, 389 U.S. 844; *Air Lines Pilots Association* v. *Quesada*, 276 F.2d 892 (C.A. 2); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624, 628-629 (C.A.D.C.), certiorari denied, 385 U.S. 843. In those cases the courts have reasoned that, if an agency's power to promul-

gate general rules were regarded as being limited by other statutory provisions prescribing separate evidentiary hearings in cases "concerned with * * * facts peculiar to an individual licensee" (*California Citizens Band Association, supra*, 375 F.2d at 52), "the processes of regulation" would be "prolonged" and "crippled" (*Texaco, supra*, 377 U.S. at 44). Nothing in Section 316 (a) of the Communications Act, on which petitioners principally rely, purports to restrict the Commission's rule-making authority. That provision simply provides an opportunity for an evidentiary hearing where a particular station's license is modified on an individual basis. Thus, the court below correctly resolved the issue in stating (Pet. App. 148-149):

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them. * * *[6]

Petitioners' reliance upon this Court's decision in *Federal Communications Commission* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239, is misplaced.

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[6] Indeed, this Court has consistently recognized that any agency's responsibility to carry out its task clearly requires this degree of flexibility. *Permian Basin Area Rate Cases*, 390 U.S. 747; *American Commercial Lines* v. *Louisville & N. R.R. Co.*, 392 U.S. 571; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

In that case station KOA (licensed to NBC) operated on a clear-channel frequency, and station WHDH sought permission to operate fulltime (instead of only daytime) at increased power on the same frequency. This Court held that a grant of WHDH's application would substantially modify KOA's license and, accordingly, that KOA was entitled to intervene as a party to the WHDH proceeding. Rule making was involved in *KOA* only in the sense that WHDH's application would have required a reclassification of KOA's frequency (see 319 U.S. at 242, 258). Nothing in *KOA*, or in Section 303(f) of the Act, on which petitioners also rely, suggests that the Commission is powerless to promulgate general rules affecting hundreds of stations without conducting a separate adjudicatory proceeding relating to each of them.[7]

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[7] Nor did this Court suggest in *KOA* that Section 303(f) of the Communications Act entitled a station to a hearing on an indirect modification resulting from increased interference. While the majority of the lower court in *KOA* did hold that Section 303(f) afforded a limited right to a hearing, this Court (contrary to petitioner WBEN's claim, Pet. No. 390, 12) rested its decision solely on Section 312(b) (now Section 316). Section 303(f) (47 U.S.C. 303(f)) affords a "public hearing" to a station whose "frequencies, authorized power, or * * * times of operation" are changed. But the court below properly held that it does not apply to indirect modification, or to the stations whose presunrise operations are limited, since the latter never had an unfettered right to operate at daytime power before sunrise (Pet. App. 153-154). This latter consideration is also an additional bar to the claim of a right under Section 316(a) to an adjudicatory hearing by daytimers and restricted fulltimers seeking expanded presunrise operation. Indeed, in *Music Broadcasting Co.* v. *Federal Communications Commission*, 217 F.2d 339 (C.A. D.C.), the permissive nature of the presunrise operation authority of daytimers under the old rule was expressly upheld (see Pet. App. 152-153).

Contrary to petitioners' contention, the decision below is fully consistent with *Transcontinent Television Corp.* v. *Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.), and *Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F.2d 637 (C.A.D.C.). Both cases involved much narrower situations than that presented here: *Transcontinent* concerned a channel change of one television station ordered by the Commission, and *Goodwill* involved the opening of 13 clear channels to additional stations. In both cases the court sustained the Commission's power to effect changes by rule making effective at the end of a license term, holding that any requirements for an evidentiary hearing in Sections 303(f) and 316(a) were inapplicable. Whatever procedure might have been required had the changes in *Transcontinent* and *Goodwill* been effected during the terms of the existing licenses—a question which the courts in those cases did not have to reach—can have little bearing on the instant case, which involves a rule of far broader applicability reflecting a basic policy determination which the Commission found it necessary to make.[8]

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[8] Revision of the presunrise rule was needed not only because of the growing chaos which the proliferation of radio stations since 1941 had caused (see note 3, *supra*), but in order to ensure compliance with our government's obligations to Canada under the North American Regional Broadcasting Agreement, ratified by the Senate in 1960, and a subsequent understanding particularizing the standards to be applied under that treaty to avoid undue interference by American stations with Canadian broadcasters (see Pet. App. 6-13, 101-103). As the court below pointed out (Pet. App. 145), "[T]he successful conclusion of the Canadian Agreement

Thus, the court below properly found no conflict among the circuits (Pet. App. 151-152).[9]

2. The court below fully assessed, and properly rejected, the contention (see Pet. No. 368, 12-13) that the Commission was required to make findings on precise gains and losses of listeners by stations under the new rule. It noted, *inter alia*, that the Commission reasonably found that those losing one service would generally have alternative services, that determining the effect on all available signals would be "an enormous task" as to which the parties had given no meaningful assistance, and that quantification was not necessary in view of the governing qualitative differences in the needs of various classes of listeners (Pet. App. 132-140).[10] Thus, as the court of appeals' painstaking analysis of petitioners' claims of agency arbi-

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powerfully supports the Commission's solution—for the first time presunrise operations have been placed on a basis consistent with our international obligations."

[9] *California Citizens Band Association* v. *United States, supra,* as pointed out above, enunciates the principle followed here. Decisions of the District of Columbia Circuit in *Saltzman* v. *Stromberg-Carlson Telephone Manufacturing Co.*, 46 F.2d 612, and *Courier-Journal Co.* v. *Federal Communications Commission*, 46 F.2d 614 (see Pet. No. 368, 10), have already been distinguished by that circuit in *Transcontinent, supra,* where the court pointed out that they predated the enactment of the Administrative Procedure Act.

[10] Thus, as the court noted (Pet. App. 132-133), those losing some fulltime service from 6 a.m. to sunrise are either close to large cities whose fulltimers generally provide ample service, or are in distant rural areas with alternative regional services. Most listeners gaining presunrise service, on the other hand, had a demonstrated need for local programs not otherwise available (Pet. App. 139).

trariness clearly demonstrates (see Pet. App. 132-142), the Commission acted on the basis of sufficient information relating to the considerations pertinent to a reshaping of the presunrise rule (see, *e.g.*, Pet. App. 20-42, 44-48, 63-108).

Finally, the court below properly rejected the argument that the Commission could not disregard showings relating to specific programming made by particular daytime stations seeking to provide expanded presunrise service (Pet. No. 369, 12-13).[11] The court correctly held (Pet. App. 157-159) that, because of the nature of the proceeding and the impermanence of specific programming, the Commission could reasonably consider such contentions upon subsequent waiver applications filed after some experience with the new rule had been gained. See *Permian Basin Area Rate Cases*, 390 U.S. 747; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

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[11] Moreover, the Commission did not reject programming as a relevant consideration; it relied heavily on the value of local presunrise programs (see Pet. App. 139).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

GREGORY B. HOVENDON,
ARTHUR I. CANTOR,
Attorneys.

HENRY GELLER,
General Counsel,

DANIEL R. OHLBAUM,
Deputy General Counsel,

STUART F. FELDSTEIN,
Counsel,
Federal Communications Commission.

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